Supreme Court, U.S.
FILED

001310 FEB 6 - 2001

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No._____

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

October Term 2000

BRIAN B., by and through his Mother, Lois B. et al, on behalf of themselves and all others similarly situated,

Petitioners

v.

COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF EDUCATION; EUGENE HICKOK, in his official capacity as Secretary of the Department of Education, et al.,

Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Third Circuit

# PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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## QUESTIONS PRESENTED

1. May Pennsylvania, consistent with the Equal Protection Clause, single out a particular group of school-age offenders incarcerated in adult county prisons and completely deny them access to education, while affording all other school age offenders, pre-trial or convicted, housed in either state adult facilities or county and state juvenile facilities, full access to education under the Pennsylvania School Code?

2. Did the lower courts fail to follow this Court's Equal Protection jurisprudence in upholding Pennsylvania's denial of education to only convicted school-age offenders in county facilities, where petitioners negated every conceivable justification for the classification put forth by the state?

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## PETITION FOR WRIT OF CERTIORARI AND APPENDIX

Petitioner Brian B. et al. respectfully requests that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Third Circuit (November 8, 2000), which held that a provision of the Pennsylvania School Code, 24 Pa. S. A. § 1306.2 (a), which singles out only one group of school-age offenders for exclusion from education services, does not violate the Equal Protection Clause of the Fourteenth Amendment.

## OPINION BELOW

The decision of an en banc panel of the United States Court of Appeals for the Third Circuit denying Appellants's petition for rehearing en banc is unreported, and is reproduced at 1a. The judgment and opinion of the United States Court of Appeals for the Third Circuit affirming the order of the United States District Court for the Eastern District of Pennsylvania is reported at 230 F.3d 582 (3d Cir. 2000), and is reproduced at Appendix pp. 3a-29a. The order and opinion of the United States District Court for the Eastern District of Pennsylvania is reported at 51 F.Supp.2d 611 (E.D.Pa. 1999), and is reproduced at Appendix pp. 30a-86a.

## JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Third Circuit denied the petition for a rehearing en banc on November 8, 2000. A panel of the United States Court of Appeals for the Third Circuit entered its judgment and opinion on October 12, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**United States Constitution, Amendment XIV, Section I:**

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

**Pennsylvania Statutes, 42 Pa. C. S. § 13-1306.2, Juveniles Incarcerated in Adult Facilities:**

> (a) A person under twenty-one (21) years of age who is confined to an adult local correctional institution following conviction for a criminal offense who is otherwise eligible for educational services as provided under this act shall be eligible to receive educational services from the board of school directors in the same manner and to the same extent as a student who has been expelled pursuant to section 1318.
>
> (b) A person under twenty-one (21) years of age who is confined to an adult local correctional institution following a charge for a criminal offense who is otherwise eligible for educational services as provided under this act shall be eligible to receive services from the board of school directors in the same manner and to the same extent as a student who has been placed in an alternative education program for disruptive students.

(c) The department shall effectuate necessary procedures for the transfer of funds from the school district of residence to the school district in which the local correctional institution is located. In effectuating the transfer of funds, the department may deduct the appropriate amount from the Basic Education Funding allocation of any school district which had resident students who were provided educational services in the local correctional facility.

(d) For purposes of this section, the term "convicted" means a finding of guilty by a judge or a jury or the entry of a plea of guilty or nolo contendere for an offense under 18 Pa.C.S. (relating to crimes and offenses) whether or not judgment of sentence has been imposed.

(e) For purposes of this section, a "local correctional institution" shall include any jail, prison or detention facility operated by a county or jointly by more than one county or by a municipality. The term does not include any facility used for the detention or confinement of juveniles.

## STATEMENT OF THE CASE

This case is about the denial of education to a small class of youth who have been tried and convicted as adults, but sentenced to county, rather than state-operated prisons. Of all those youth in Pennsylvania charged and/or convicted of crimes -- whether they are in the juvenile or adult criminal justice systems - this class of petitioners is the only group that is denied an education under Pennsylvania law. Ironically, among youth tried and sentenced as adults, this class includes the least violent and least serious offenders.

This case began as a civil rights class action, filed in December 1996 in the United States District Court for the Eastern District of Pennsylvania, on behalf of a statewide class of school-age pre-trial and convicted offenders detained or incarcerated in Pennsylvania's 73 adult county prisons and jails, to enforce plaintiffs' rights to basic and special education programming under state and federal law. At the time plaintiffs filed their Complaint, the Pennsylvania School Code afforded all resident children in Pennsylvania, between the ages of 6 and 21, the right to a free public education -- including school age youth housed or incarcerated in juvenile or adult correctional facilities.[1] Similarly, under the Individuals With Disabilities in Education Act, 20 U.S.C. § 1400 *et seq.*, and state special education law, eligible (educationally disabled) plaintiffs were also entitled to a free and appropriate public

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[1]See 22 Pa. Code § 12.1. A full educational program, as defined by state law, consists of 5 ½ hours of instruction per week for 180 days per year. Appendix p.33a-34a; 24 Pa. C. S. § 15-1504.

education, regardless of their incarceration or detention in correctional facilities.[2] The responsibility for providing educational services to youth residing in institutions rested with the local school district within which the institution was physically located. 24 Pa. C. S. § 1306.

The original named plaintiffs included six school-aged youths housed in three of these county jails: Delaware County Prison, Philadelphia House of Correction and York County Prison. None of the named plaintiffs had completed a secondary education. Additionally, four of the named plaintiffs had been identified as eligible for special education and related services under the Individuals with Disabilities Education Act, ("IDEA") 20 U.S.C. §§1400, *et seq.*, and Section 504 of the Rehabilitation Act of 1973, ("Section 504") 29 U.S.C. § 794.[3]

The defendants were the Pennsylvania Department of Education ("PDE"); Eugene Hickok, Secretary for PDE; and the three school districts responsible for providing

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[2]See Alexander S. v. Boyd, 876 F. Supp. 773 (D.S.C. 1995), reversed on other grounds, 113 F. 3d 1373, cert. denied, 622 U.S. 1090 (1998).

[3]In the original complaint, plaintiffs alleged violations of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.;* IDEA implementing regulations; due process and equal protection guaranteed by the Fourteenth Amendment of the United States Constitution; and supplemental state claims sounding in the Pennsylvania Public School Code, 24 Pa. C. S. §§ 1-101 *et seq.*.

education in the county jails in which the named plaintiffs were being held: Garnet Valley School District, Philadelphia School District, and Central York School District.

Approximately six months after plaintiffs filed their Complaint, the Pennsylvania General Assembly amended the Pennsylvania School Code to radically limit the education rights of just one particular group of school age youth in Pennsylvania -- convicted school-aged offenders incarcerated in county adult correctional facilities, *a sub-class of the plaintiffs in this lawsuit.* See 24 Pa. C. S. § 13-1306.2(a).[4] Specifically, Section 1306.2(a) now requires that convicted school-aged youth confined as adults in county prisons and jails, who prior to the amendment were "otherwise entitled to education under the School Code," be treated as youth who have been expelled from school.[5] This meant that convicted school-age offenders in these county facilities who were under the age of seventeen were entitled to no more than five hours - and as little as one and one/half hours — of educational

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[4]Act 30 of June 25, 1997, No. 30, § 5, 1997 Pa. Laws 297 (amending the Pennsylvania School code, 24 Pa. C. S. § 13-1306).

[5]The statute states that "[a] person under twenty-one (21) years of age who is confined to an adult local correctional institution following conviction for a criminal offense who is otherwise eligible for educational services as provided under this act shall be eligible to receive educational services from the board of school directors in the same manner and to the same extent as a student who has been expelled...." (emphasis added)

programming per week,[6] and school-age offenders aged 17-21 were entitled to no further education at all while incarcerated.[7]

With the enactment of Section 1306.2(a), Pennsylvania not only eradicated the educational entitlement of these convicted offenders *vis-a-vis* all other school age residents of Pennsylvania, it also enacted into law a two tier system of education for school age youth involved in the juvenile and adult criminal justice systems. While convicted offenders in *adult county facilities* were effectively barred from school, all other convicted school-aged offenders incarcerated in adult state correctional institutions or, pursuant to an adjudication of delinquency, in juvenile correctional facilities (state or county-operated), remained entitled to basic education under the School Code. Likewise, all *pre-trial* school-age youth in either juvenile or adult facilities remain entitled to basic education under Pennsylvania law.

Importantly, the basis for depriving these plaintiffs of an education had nothing to do with their behavior at school, or for that matter with any aspect of their educational history. Indeed, although the statute dictated that they be *treated* as expelled students, plaintiffs had not, in fact, been expelled from school, nor afforded any due

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[6]Appendix at pp. 33a-34a, 59a-60a (finding that the "accepted instructional ration" for expelled students under age 17 is five hours per week, as contrasted to 27.5 hours per week for others).

[7]Id.

process procedures concerning their in-school behavior.[8] Rather, the sole variable that determines whether a school-aged person who is convicted as an adult will be educated is the *location of his confinement*. If he is sent to a state adult facility, he can go to school; if he is sent to a state juvenile facility, he can go to school; if he is sent to a county juvenile detention facility, he can go to school; *if he is sent to a county adult facility, he cannot go to school.*

The decision as to where an individual will be confined depends, in turn, on the length of the individual's sentence and, in certain instances, the discretion of the sentencing judge.[9] There is no suggestion in the record below that educational factors play a significant role in these decisions. There is also no suggestion, much less any evidence, that the characteristics of individuals sent to state prison differ in any relevant respect from those of petitioners, except that, as among the two groups, *it is petitioners who have committed less serious crimes and received lesser sentences.* Simply put, inmates in state correctional facilities who have committed murder and other more serious crimes retain their right to education, while less serious, mostly non-violent, youthful offenders sentenced to county facilities have been stripped of that right.

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[8] See 24 Pa.C. S. §§ 13-1317, 13-1318; Goss v. Lopez, 419 U.S. 565 (1975).

[9] Appendix at 66a. Persons whose sentence is two years or less are housed in county facilities; those whose sentence is five years or more are housed in state facilities; and those with sentences of between two and five years can be housed in either type of facility, at the discretion of the sentencing judge.

Two months after § 1306.2(a)'s passage, plaintiffs filed an Amended Complaint and Motion for a Preliminary Injunction, challenging this amendment to the School Code as violative of the Equal Protection Clause of the Fourteenth Amendment for treating similarly situated groups of school-age inmates unequally.

A hearing on plaintiffs' motion for a preliminary injunction was held on November 24-26, 1997. Prior to the hearing, plaintiffs and the Commonwealth defendants had entered into a settlement agreement which settled – with the exception of this equal protection claim, which was the subject of the hearing and subsequent appeals – all of plaintiffs' claims against the Commonwealth under federal and state special education laws, and which further settled plaintiffs' claims under 24 Pa. C. S. § 13-1306.2(b). Specifically, the Commonwealth defendants agreed to ensure the enforcement of the IDEA for eligible inmates (including eligible pre-trial and convicted youth) in the county prisons, to advise school districts of their obligation to provide basic education services to pre-trial school-aged youth in the county prisons (as well as special education for all eligible inmates), and to establish minimum requirements for alternative education programs.[10]

At the hearing on plaintiffs' motion for a preliminary injunction, the parties presented testimony

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[10]Pursuant to the agreement between the Commonwealth defendants and plaintiffs, the Pennsylvania Department of Education issued a policy bulletin, known as a Basic Education Circular, which outlines school district obligations to pre-trial youth and youth eligible for special education.

and evidence relating to the constitutionality of § 1306.2(a). At the conclusion of the hearing, the Court certified the plaintiff class. Among other things, the district court found that the "radical abridgement of classroom hours"[11] effected by § 13-1306.2(a) has a drastic effect on plaintiffs. For these individuals, the majority of whom "have a history of poor educational achievement, school failure, and low skill proficiency...," the deprivation of education has a "severely detrimental impact."[12] For those under 17, the minimal instruction offered "provides little benefit," and "is not sufficient to learn basic skills, let alone to pass a GED examination"; many of these individuals will, upon release, "find themselves illiterate and unemployable."[13] For those over 17, who are provided with no education at all, the effect is even harsher. The bottom line is that:

> [P]ersons who enter county correctional institutions deficient in basic skills and are then deprived of education while incarcerated are unlikely to become literate upon release. And those who do not gain a high school diploma are anywhere from three to five times as likely to suffer poverty as their graduating peers. Moreover, they are more than five times as likely to be forced to rely on public

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[11]Appendix p. 62a.

[12]Appendix p. 61a, 69a.

[13]Appendix p. 62a.

assistance, and more than three times as likely *to be unemployed.*[14]

Finally, the record showed that the burdens on county jails of educating plaintiffs are *de minimis.* The educational services themselves, *i.e.*, teachers, materials, and so forth, are provided by the local school district.[15] With regard to the provision of space for educational programs, evidence adduced at the hearing showed that only three county correctional institutions had no current program space; some others had "very limited facilities for all programs." The total number of institutions in which space "would be a problem" was 13; these are among the smallest of the 73 county facilities. Even in those institutions, defendants have made available, or would shortly make available pursuant to agreements in this case, space in which to provide basic educational services to pre-trial detainees and special educational services to *all* eligible inmates.[16]

It was also undisputed that in all other situations in the Commonwealth, space problems are addressed rather than allowed to trump the duty to provide educational services; thus, if state prisons, or for that matter local schools, need additional space, the space is found or built. Finally, apart from minimal space issues, the record revealed no burdens, in terms of security or otherwise, that might result from the provision of education to appellants.

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[14]Appendix pp. 68a-69a.

[15]24 Pa. C. S. § 13-1306.

[16]Appendix pp. 72a-74a.

On June 17, 1999, despite its characterization of the challenged classification as "barely arguably-penny-wise-but-almost-certainly-pound-foolish," Appendix p. 32a, the district court denied plaintiffs' motion for a preliminary injunction. Plaintiffs appealed this ruling to the United States Court of Appeals for the Third Circuit. On October 12, a panel of the Third Circuit affirmed the district court, with one judge dissenting. Plaintiffs' Petition for Rehearing en Banc was denied November 8, 2000.

## REASONS THE COURT SHOULD GRANT A WRIT OF CERTIORARI

This Court has long recognized education as a constitutionally significant value because it provides the foundation of meaningful participation in a democratic society. Nearly half a century ago, in Brown v. Board of Education, 347 U.S. 482, 491 (1954), this Court wrote,

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. . . . It is the very foundation of good citizenship. Today it is the principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment . . . . Such a right, where the state has undertaken to provide it, must be available to all on equal terms.

More recently, in Plyler v. Doe, 457 U.S. 202 (1982), this Court reiterated its views first articulated in Brown that, while not a fundamental right, "neither is [education] merely some governmental benefit indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of a child, mark its distinction." 457 U.S. at 221. When we deny youth a basic education, "we deny them the ability to live within our civic institutions, and foreclose the possibility that they will contribute in even the smallest

way to the progress of our Nation." Id. at 223. When an individual is deprived of a basic education, that deprivation works an "inestimable toll" on the social, economic, intellectual and psychological well-being of the individual," and poses an "obstacle to individual achievement" that "makes it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause." Id. at 222.

This case presents this Court with a critical question about state limits on educational access not yet addressed -- whether a state may constitutionally single out a discrete class of school age youth and completely deny them access to educational services. In Brown, this Court ruled that state education laws and systems which established racially segregated school systems were unconstitutional. Since Brown, this Court has considered the constitutionality of state legislative schemes which hindered transportation access to schools for particular classes of children, Kadrmas v. Dickinson Public Schools, 487 U.S. 450 (1988), permitted unequal financing and, consequently, uneven quality of local school systems within a state, San Antonio Independent School District v. Rodriguez, 411 U. S. 1 (1973); Papasan v. Allain, 478 U.S. 265 (1986), or authorized public schools to deny free access to the children of illegal immigrants, Plyler. The constitutionality of a state statutory scheme which *completely*[17] strips one group of "otherwise eligible"

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[17]Plainly, the restrictions at issue in San Antonio, Kadrmas and Papasan did not actually bar children's access to education -- Papasan and Rodriguez involved challenges to state financing schemes which, while

children of their state-created right to education has never before been considered by this Court.

Additionally, the continuing viability of rational basis review under the Equal Protection Clause of the Fourteenth Amendment as even a minimal check on state

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resulting in disparate financial resources to school districts, affected the quality, not the actual availability, of education to the affected students. Likewise, even in Plyler, while the local school district could deny free education to the children of illegal aliens, at least theoretically these children could pay a "tuition fee" to attend their local public schools. 457 U.S. at 206, n.2.

Under the challenged statute here, convicted youth do not even have the Plyler option. They cannot "buy" a seat in the classroom in the county jail - Section 1306.2(a) provides for the total exclusion of these students from the county jails' educational programs.

Additionally, while a portion of these youth under the age of 17 are technically entitled to "some" education -- interpreted by Pennsylvania law to include no more than 5, and as little as 1.5 hours *per week*, see Abremski v. Southeastern School District Board of Directors, 421 A. 2d 485, 488-489 (Pa. Commw. 1980) -- the district court found that the availability of even up to 5 hours per week of instruction is of no educational consequence. As the district court concluded, "uncontested evidence indicates that five hours of instruction per week is not sufficient to learn basic skills, let alone pass a GED examination. . . .Indeed, expert testimony suggests -- without contradiction -- that an educational program offering only five hours of instruction per week provides little benefit." Appendix p. 61a.

legislative action is at stake here. The district court's and Third Circuit's analyses of Pennsylvania's statutory scheme comes dangerously close to converting rational basis review from a policy of extending deference to state legislative initiatives to one adopting a blind faith in such initiatives. As Judge Roth observed in her dissent from the Third Circuit's affirmance of the district court, "making a legislative judgment 'virtually unreviewable,'" [Beach Communications v. FCC, 508 U.S. at 316,] does not make it non-justiciable. Yet this is the practical effect of the majority's terse treatment of the plaintiffs' plight." Appendix p. 17a.

Indeed, the Third Circuit majority's "terse treatment of the plaintiffs' plight" signals a view of the Equal Protection clause deeply at odds with this Court's jurisprudence. Over the course of several decades, this Court has provided a blueprint for rational basis review which has resulted in the striking down of legislative classifications outside that framework.[18] At a minimum, classifications impinging on important rights such as education (Plyler), housing (Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), or access to the political process (Romer v Evans, 517 U.S. 620 (1996), warrant a level of scrutiny that at least acknowledges a "rational" connection between the purported legislative end and the means adopted to achieve that end. When no

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[18] See, e.g., United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973) (claim to a minimum level of food stamps); Zobel v. Williams, 457 U.S. 55 (1982) (monetary benefits from the government); Hooper v. Bernalillo Cty. Assessor, 472 U.S. 612 (1985) (property tax benefit for Vietnam veterans)..

such connection can be found, or when plaintiffs have negated each of the purported rationales, or the legislative end is found to be illegitimate, see, e.g., Cleburne; Romer, this Court has ruled such classifications invidious and invalidated them. The Third Circuit decision in this case ignores – and threatens to erase – this blueprint.

## I. IN UPHOLDING THE CHALLENGED CLASSIFICATION, THE LOWER COURTS IGNORED PREVAILING SUPREME COURT JURISPRUDENCE.

### A. The Lower Courts Applied an Equal Protection Analysis That Is Not Applicable To Cases Involving Important Societal Interests Such As Education

In upholding the challenged statute under the Equal Protection Clause, both the district court and the Third Circuit majority relied exclusively on FCC v. Beach Communications, 508 U.S. 307 (1993), and Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483 (1955), cases in which this Court upheld, under rational basis review, the constitutionality of legislative classifications impinging on purely economic interests. Viewed through this limited lens, the lower courts adopted the rationales tendered by the state for the targeted exclusion of plaintiffs from school, without regard to the actual "rationality" of those reasons, and, indeed, without regard to the actual record before them. As Lee and Beach held with respect to the particular classifications at issue in those cases, a court generally should not second guess the legislature's wisdom or its policy judgment. "[J]udicial intervention is generally unwarranted no matter how unwisely a [court] may think a political branch has acted." Beach, 508 U.S. at 316.

However, as Judge Roth states in her dissent to the Third Circuit's decision, the majority's application of Lee and Beach to the classification here "bends too far to accommodate this standard."[19] Appendix p. 17a. Rather, in cases involving legislative classifications which impinge on sensitive issues or controversial social policies, this Court has repeatedly instructed that "[t]here are limits to the deference owed to the legislature. . . . [This Court] has applied rational basis review more circumspectly." Id. Judge Roth wrote:

> As I read the cases, even when applying rational basis scrutiny, our task of "adjudication is not a mechanical exercise nor does it compel 'either/or' determinations." See Griffin v. Illinois, 351 U.S. 12,] 26 (Frankfurter, J., concurring). Thus, while Lee Optical and Beach Communications, Inc. give states a wide berth to craft solutions to policy problems one step at a time, they do not forbid our review of challenged social or economic legislation.

Appendix p. 28a.

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[19]Even in Nordlinger v. Hahn, 505 U.S. 1 (1992), where the Court noted the special deference accorded tax regulations, this Court described rational basis review in more searching terms than espoused by the lower courts here. Noting that rational basis review is satisfied so long as "the legislative facts on which the classification is apparently based may have been considered to be true by the governmental decisionmaker," this Court then reiterated its requirement in Cleburne that the classification may not be so attenuated as to render the distinction "arbitrary or irrational." 505 U.S. 11.

The right at issue here, education, warrants this more searching scrutiny – even under rational basis review. Because § 1306.2(a) denies plaintiffs a state created right to education guaranteed to all other school-age county and state inmates, the lower courts erred in not looking beyond Beach and Lee for further guidance in reviewing the classification. Supreme Court case law instructs that a more searching critique of legislation denying education to a discrete class of youth must be undertaken. Plyler, 457 U.S. at 221. Whether applying heightened scrutiny, as this Court did in Plyler,[20] or

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[20] Petitioners argued to both the district court and the Third Circuit that Plyler's intermediate "heightened" standard of review applied to the classification here. Specifically, petitioners argued that the four elements identified by this Court in Plyler as warranting heightened scrutiny – a denial of education, plaintiffs' lack of power over their disabling status, the importance of the right to education in maintaining basic institutions, and the consequences to individuals flowing from the deprivation of education – were present in this case as well.

The Third Circuit's refusal to apply heightened scrutiny is at odds with the decision of the Eighth Circuit in Horton v. Marshall Public Schools, 769 F. 2d 1323 (8th Cir. 1985), where the court followed Plyler and applied heightened scrutiny to an Arkansas residency requirement which provided that only children domiciled or residing with a parent or guardian in the local school district could attend the local public schools. Characterizing the provision as singling out a group of children "to be totally deprived of an education," 769 F. 2d at 1330, the court ruled that such a denial of education could "hardly be considered rational unless it further[ed] some substantial

rational basis review, as the lower courts did here, and this Court has done in other education cases that have come before it, the courts must still scrutinize an educational classification with sufficient care to ensure that the government end is legitimate, and that the means selected to achieve that end are rational.[21]

Nor is this more searching rational basis review limited to education cases. In cases concerning similarly sensitive issues or classes of individuals, this Court has not hesitated to search the record for evidence that the classification is rational, and not arbitrary or invidious.

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goal of the state." Id., quoting Plyler, 457 U.S. at 224. See also Nancy M. v. Scanlon, 666 F.Supp. 723 (E.D. Pa. 1987) (heightened scrutiny applied to provision of Pennsylvania School Code which excluded non-resident children from attending local public schools, since these children did not reside with a parent or guardian in the district); Major v. Nederland Independent School District, 772 F. Supp. 944 (E.D. Tex. 1991) (same).

[21]In San Antonio and Kadrmas, where this Court applied only rational basis review, the Court still made a determination that the classifications at issue bore a reasonable relationship to the state's goals, as determined from the record. San Antonio, 411 U.S. at 56 ("The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. . . We hold that the Texas plan abundantly satisfies this standard."); Kadrmas, 487 U.S. at 465. In Papasan, this Court remanded the case for further development of the record before the trial court. 478 U.S. at 292.

Thus, in Heller v. Doe, 509 U.S. 312, 321 (1993), a case involving the rights of the mentally ill, this Court specifically declared that the legislative classification must "find some footing in the realities of the subject addressed by the legislation." To that end, this Court undertook an extensive analysis of the evidence produced in the case to ascertain the "rationality" of a legislative scheme which treated differently, for the purposes of commitment, mentally disabled and mentally retarded persons.[22]

Similarly, in City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446 (1985), a case involving the rights of mentally disabled persons to live as a group in certain types of housing open to non-disabled groups of individuals, this Court also insisted on knowing the connection between the legislative end and the means chosen. According to this Court, the State may not "rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational."[23]

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[22]Compare the record before the Court in Heller v. Doe, which contained extensive evidence and documentation of the differences in treatment and diagnosis of the mentally ill and mentally retarded such that Kentucky's more lenient commitment procedures for the mentally retarded were upheld, with the wholly speculative and unsupported record in this case regarding the alleged burdens on school districts to extend educational services to plaintiffs.

[23]Had the lower courts followed the teachings of this Court in Cleburne, the classification would surely have been invalidated, as it is even more arbitrary and irrational

than the zoning ordinance successfully challenged in Cleburne. In Cleburne, this Court wrote "that the mentally retarded as a group are indeed different ... from those who would occupy other facilities that would be permitted in [the same] zone without a special permit." 473 U.S. at 448. No such argument premised on even minor distinctions between petitioners and all other incarcerated school aged youth can be made in favor of Section 1306.2(a). As enacted, the statute expressly exempts similarly situated school-aged youth housed in state-operated correctional facilities and county-operated juvenile facilities. Only the location and type of facility where they happen to be housed distinguish petitioners from all other convicted school-aged inmates. If the zoning ordinance in Cleburne had required a special use permit based upon which sub-group of the mentally retarded the applicant belonged to, its arbitrariness would be even more manifest; yet the Court did not require such "heightened" irrationality as a prerequisite to striking down the statute.

Moreover, Cleburne is particularly instructive in assessing the legitimacy of a classification when *the record does not support the government's objectives*. The Court in Cleburne independently examined the evidence in the record which supported the city's purported purposes, and found those purposes unsupported by the evidence. Id. at 449-50. The Court declared the classification in Cleburne invalid because:

> [the] record does not clarify how, in this connection, the characteristics of the intended occupants of the [group] home rationally justify denying to those

Most recently, in Romer v. Evans, 517 U.S. 620 (1996), where this Court struck down a Colorado constitutional amendment singling out its gay and lesbian citizens for exclusion from state and local laws designed to prohibit discrimination against certain other classes of residents, this Court pointed out that "[t]he search for the link between classification and objective gives substance to the Equal Protection Clause ... By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law." 517 U.S. at 632-33.

Judge Roth's analysis demonstrates how both the district court and Third Circuit majority's selective and limited reading of Supreme Court precedent produced a

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> occupants what would be permitted to groups occupying the same site for different purposes.... The short of it is that requiring the permit in this case appears to us to rest on an irrational prejudice against the mentally retarded....

Id. at 450.

Likewise here, the record "does not clarify how, in this connection, the characteristics of the [excluded convicted inmates] rationally justify denying to those [inmates] what would be permitted to [all other convicted inmates] occupying the [comparable] site[s] for [*identical*] purposes." Id. (emphasis supplied).

result that fails to conform to the full body of this Court's teachings. By ignoring all but two of this Court's Equal Protection decisions, the majority blithely accepts the state's post hoc rationalizations for the classification while closing its eyes to the invidious discrimination which underlies the classification - and which the Equal Protection Clause forbids. While Judge Roth, and plaintiffs, readily acknowledge that prisoners are not a suspect class, they are a group to whom the legislature has limited accountability -- meaning limited opportunity to rectify "'even improvident decisions ... by the democratic process.'" Appendix pp. 20a, quoting Vance v. Bradley, 440 U.S. 93, 97 (1979). But as the Supreme Court has held, even under rational basis review, "limited political accountability obligates a court to 'insist on knowing the relation between the classification adopted and the object to be attained.'" Appendix pp. 19a-20a, quoting Romer, 517 U.S. at 632. Moreover, the "object to be attained" must be legitimate. Cleburne holds that "invidious discrimination -- whether motivated by antipathy or a desire to harm a politically impotent group -- is an illegitimate aim." 473 U.S. at 447. In Judge Roth's view, "[t]he cursory explanations that Pennsylvania's [Department of Education] offers to justify [the challenged classification], ... especially in reference to an important benefit like education, suggest an apathy that borders on antipathy." Appendix p. 20a.[24] Declaring that

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[24]The purpose of the Equal Protection Clause is to secure *every* person within the State's jurisdiction against international and arbitrary discrimination. See Village of Willowbrook v. Olech, 528 U.S. 1073 (2000) (holding that the Equal Protection Clause gives rise to a cause of action on behalf of a class of *one*).

Pennsylvania's isolation of this particular group of school-age inmates "awakens my skepticism," id., Judge Roth found the classification so arbitrary it could not withstand even rational basis scrutiny under prevailing Supreme Court jurisprudence -- the very jurisprudence which the both the district court and the Third Circuit majority have ignored.

### B. The Lower Courts Failed to Follow This Court's Equal Protection Jurisprudence By Upholding the Statute Even After Petitioners "Negated Every Conceivable Justification For the Classification"

While rational basis review may not require a state to prove its justifications, it does afford challengers the opportunity to rebut these justifications. Beach Communications, 508 U.S. at 315. Thus, even under the narrow rational basis test adopted by the panel's majority, plaintiffs should have prevailed once they "'negate[d] every conceivable justification for the classification.'" Appendix p. 12a, quoting Beach, 508 U.S. at 314-315. As Judge Roth shows in her analysis of each of the State's proffered post hoc rationales and petitioners' evidence with respect to each, petitioners did precisely that. Calling the State's claims "inconsistent, piecemeal rationalizations to justify its categorization that cordons off this single group of youth offenders," Appendix p. 21a, Judge Roth expressly found that the classification and the rationalizations offered for it lacked "some footing in the realities of the subject addressed by the legislation." Id. at 15, quoting Heller, 509 U.S. at 321. The majority's failure to credit the uncontroverted record below is completely out of step with this Court's teachings, and threatens to make

a mockery of even limited rational basis review under the Equal Protection Clause.

Specifically, the Commonwealth offered four purported reasons for the classification, all of which petitioners successfully rebutted. These rationales included alleged limitations of space in a fraction of the county facilities, a purported higher per-student cost for education in county facilities, a claim that inmates in state facilities have a greater need for education than county inmates and, finally, a claim that providing education to inmates in county facilities might create security problems in state facilities.[25] As Judge Roth demonstrates at length in her detailed review of the record, not one of these alleged justifications for the statute had any "footing in the realities of the subject addressed by the legislation." Heller, 509 U.S. at 321.

Judge Roth's conclusion that § 1306.2(a) does not pass even minimal rational basis scrutiny is mandated by the teachings of the Supreme Court:

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[25]This fourth rationale was even rejected by the District Court as unsupported by the record, and should have been likewise rejected by the panel majority. As both the District Court and Judge Roth point out, this objective is irrelevant in the context of this case. Appendix p. 25a. Since petitioners never requested that state inmates be denied education, and there is certainly no indication or suggestion in the record that they will be if education is extended to county inmates, there is no basis whatsoever to even speculate about security concerns in state facilities.

> In sum, the Pennsylvania DOE's purported objectives are undermined by its decision to deny the educational benefits to county-incarcerated, school-age inmates that it is willing to provide to pre-trial detainees and to special education inmates in the same facilities. The reasons for distinguishing this category of school-age inmates in the county facilities are so unrelated to the purported objectives of limited space and higher per-student cost that they can only be arbitrary. As a result, the broader distinctions between state and county inmates cannot itself withstand the limited scrutiny that rational basis review applies. These flawed justifications bear as little rational relationship to the statutory classification at hand as the reasons offered by the City of Cleburne to justify its differential treatment of the mentally retarded. See Cleburne, 473 U.S. at 448-450.

Appendix p. 25a-26a.

Judge Roth found that petitioners had done all that rational basis review requires of them: "They have demonstrated that there is no rational relationship between the statutory classification and the purported government objectives." Appendix p. 27a. Petitioners met the requirement of Beach Communications that "those attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.'" Appendix p. (3rd cir op at 20, citing Beach, 508 U.S. at 315.

While a state is not obligated by the federal Constitution to provide its citizens with a free public education, once it decides to do so, as Pennsylvania has, it may not arbitrarily deny some of its citizens access to this benefit. In finding the classification at issue here a violation of the Equal Protection Clause, Judge Roth concluded:

> In Pennsylvania's case, its hodgepodge of justifications for treating school-age county inmates differently than every other conceivable category of school-age prisoners, in adult or juvenile confinement, and treating them like expelled students, with whom they share no rational connection, amounts to just this type of prohibited arbitrary denial. As Justice Jackson once wisely observed, "we are much more likely to find arbitrariness in the regulation of the few than of the many." [Railway Express Agency v. New York, 336 U.S. 106, 113 (1949) (concurring opinion). Pennsylvania's restriction to county-incarcerated, school-age inmates aptly proves this point.

Appendix p. 28a-29a.

## CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

/s/M. Levick
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Juvenile Law Center
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No. _____

United States Court of Appeals, Third Circuit.

**BRIAN B., by and through his mother, Lois B.; Abdul R., by and through his mother, Dena R.; Byron A., by and through his mother, Carrie W.; Ronelle W., by and through his mother, Pamela J.; Steven S., by and through his guardian, Nancy F.; Anthony T., by and through his mother, Christine H.; Kenneth R., by and through his mother, Nancy R.; Jeremiah M., by and through his mother, Susan M.; on behalf of themselves and all others similarly situated,**

**v.**

**COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF EDUCATION; Eugene W. Hickok, in his official capacity as Secretary of the Department of Education; Garnet Valley School District; Philadelphia School District; Central York School District, Brian B.; Abdul R.; Byron A.; Ronelle W.; Steven S.; Anthony T.; Kenneth R.; Jeremiah M., Appellants.**

**On Appeal From the United States District Court For the Eastern District of Pennsylvania (D.C. Civil Action No. 96-cv-07991) District Judge: Honorable Louis H. Pollak**

Before: BECKER, Chief Judge, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, BARRY, AMBRO, FUENTES and STAPLETON *Circuit Judges

## ORDER

The petition for rehearing en banc filed by Appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en banc, the petition for rehearing is denied. Judge Nygaard would have granted rehearing.

By the Court,
/s/ J. Roth
Jane R. Roth, Circuit Judge

Dated: Nov. 8, 2000

United States Court of Appeals, Third Circuit.

**BRIAN B., by and through his mother, Lois B.; Abdul R., by and through his mother, Dena R.; Byron A., by and through his mother, Carrie W.; Ronelle W., by and through his mother, Pamela J.; Steven S., by and through his guardian, Nancy F.; Anthony T., by and through his mother, Christine H.; Kenneth R., by and through his mother, Nancy R.; Jeremiah M., by and through his mother, Susan M.; on behalf of themselves and all others similarly situated,**

**v.**

**COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF EDUCATION; Eugene W. Hickok, in his official capacity as Secretary of the Department of Education; Garnet Valley School District; Philadelphia School District; Central York School District,**

**Brian B.; Abdul R.; Byron A.; Ronelle W.; Steven S.; Anthony T.; Kenneth R.; Jeremiah M., Appellants.**

**No. 99-1576.**

Argued March 2, 2000.

BEFORE: ROTH, BARRY and STAPLETON, Circuit Judges

JUDGMENT

This cause came on to be heard on the record before the United States District Court for the Eastern District of Pennsylvania and was argued by counsel before this Court on March 2, 2000.

On consideration whereof, it is

ORDERED and ADJUDGED by this Court that the order of the District Court entered June 17, 1999, be and the same is hereby affirmed. Costs taxed against appellants. All of the above is in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron,

Clerk

United States Court of Appeals, Third Circuit.

**BRIAN B., by and through his mother, Lois B.; Abdul R., by and through his mother, Dena R.; Byron A., by and through his mother, Carrie W.; Ronelle W., by and through his mother, Pamela J.; Steven S., by and through his guardian, Nancy F.; Anthony T., by and through his mother, Christine H.; Kenneth R., by and through his mother, Nancy R.; Jeremiah M., by and through his mother, Susan M.; on behalf of themselves and all others similarly situated,**

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**COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF EDUCATION; Eugene W. Hickok, in his official capacity as Secretary of the Department of Education; Garnet Valley School District; Philadelphia School District; Central York School District,**

**Brian B.; Abdul R.; Byron A.; Ronelle W.; Steven S.; Anthony T.; Kenneth R.; Jeremiah M., Appellants.**

**No. 99-1576.**

Argued March 2, 2000.
Opinion filed Oct. 12, 2000.

On Appeal From the United States District Court For the Eastern District of Pennsylvania, (D.C. Civil Action No. 96-cv-07991), District Judge: Honorable Louis H. Pollak.

Marsha L. Levick (Argued), Juvenile Law Center of Philadelphia, Philadelphia, PA, Attorney for Appellants.

Michael L. Harvey (Argued), Office of the Attorney General of Pennsylvania, Harrisburg, PA, Attorney for Appellees.

Theresa Glennon, Temple University School of Law, Philadelphia, PA, Attorney for Amici Curiae American Civil Liberties Union of Pennsylvania; Center for Law and Education; National Center for Youth Law; Youth Law Center; Children and Family Justice Center of Northwestern University School of Law; Professor Theresa Glennon; and Professor Dean Hill Rivkin.

Thomas B. Schmidt, III Pepper, Hamilton & Scheetz, Harrisburg, PA, Attorney for Amici Curiae American Probation and Parole Association; Center for Children's Policy, Practice and Research; Center for Health, Achievement, Neighborhood, Growth and Ethnic Studies (Changes); Center for Research and Evaluation in Social Policy; The Center on Juvenile & Criminal Justice; Citizens United for the Rehabilitation of Errants (Cure); Council of Juvenile Correctional Administrators; Criminal Justice Center, The College of New Jersey; Dr. Barry Krisberg, National Council on Crime and Delinquency; National Center on Institutions and Alternatives; National Council on Crime and Delinquency; National Juvenile Detention Association; National Legal Aid and Defender Association; Pennsylvania Prison Society; and The Sentencing Project.

Before ROTH, BARRY and STAPLETON, Circuit Judges.

OPINION OF THE COURT

STAPLETON, Circuit Judge:
Brian B. and a class of similarly situated school-aged youths ("Plaintiffs") appeal the District Court's denial of their motion for a preliminary injunction barring enforcement of a Pennsylvania statute on constitutional grounds. The statute, 24 Pa. Cons.Stat. § 13-1306.2(a) ("Subsection A"), limits the education available toyouths convicted as adults and incarcerated in adult, county correctional facilities. The Defendants are the Pennsylvania Department of Education ("DOE"), its secretary, and three local school districts.

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. We have appellate jurisdiction under 28 U.S.C. § 1292(a)(1).

I.

Pennsylvania law confers on youths between the ages of 6 and 21 the right to a public education until the completion of high school. See 24 Pa. Stat. Ann. tit. 13, § 1301. In accordance with this statutory mandate, juveniles who have been adjudicated delinquent and youths who have been convicted as adults and sentenced to state correctional institutions receive full education programs. Subsection A, however, provides that youths convicted as adults and sentenced to adult, county facilities are only entitled to the minimal education provided to expelled students:

> A person under twenty-one (21) years of age who is confined to an adult local correctional institution following conviction for a criminal offense who is otherwise eligible for educational services as provided under this act

> shall be eligible to receive educational services from the board of school directors in the same manner and to the same extent as a student who has been expelled....

24 Pa. Cons.Stat. § 13-1306.2(a). County facilities are the only "local" ones.

An expelled student under age 17 has a right to only minimal educational services (about 5 hours per week versus the usual 27.5 hours), and an expelled student 17 or older is not entitled to education at all. See 22 Pa.Code § 12.6(e) (providing that expelled students under 17 are still entitled to education). As a result, Subsection A substantially limits, and for those 17 and over eliminates, the educational opportunities of youths convicted as adults and sentenced to adult, county correctional facilities. Although Subsection A treats these youths as if they were expelled, there is no requirement that they be expelled or that their offenses be school-related.

Subsection A thus differentiates between school-aged youths convicted as adults based upon the locale of their incarceration: state inmates receive a full education, while county inmates receive limited education. A youthful offender's place of incarceration depends on the length of sentence and in certain cases the discretion of the sentencing judge. Those sentenced to two years or less are confined in county facilities. Those sentenced tofive years or more go to state facilities. Sentences between two and five years can be served in either a county or state facility at the discretion of the sentencing judge. See 42 Pa. Const. Stat. § 9762.

Pre-trial detainees and special education students are the only exceptions from Subsection A. As a result of a settlement agreement prompted by this case, all school-aged youths confined as pre-trial detainees receive a full educational program, as do all school-aged youths who require special education because of a disability.

The District Court applied rational basis review under the Equal Protection Clause and concluded that the Plaintiffs had failed to show the reasonable probability of success on the merits necessary for a preliminary injunction. The Plaintiffs insist that because Subsection A burdens education, the statute warrants heightened scrutiny under Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). Moreover, the Plaintiffs contend that even if Plyler's intermediate scrutiny does not apply, Subsection A also fails to pass constitutional muster under rational basis review.

A district court considering a motion for preliminary injunction must decide:

> (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably harmed by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 158 (3d Cir.1999) (citing ACLU v. Black Horse Pike Regional Bd. of Educ., 84 F.3d 1471, 1477 n. 2 (3d Cir.1996) (en banc)). "We review a district court's [disposition] of a preliminary injunction according to a three-part standard. Legal

conclusions are reviewed de novo, findings of fact are reviewed for clear error, and the 'ultimate decision to grant or deny the preliminary injunction' is reviewed for abuse of discretion." ACLU v. Reno, 217 F.3d 162, 2000 U.S.App. LEXIS 14419, at *27 (3d Cir. June 22, 2000) (quoting Maldonado v. Houstoun, 157 F.3d 179, 183 (3d Cir.1998), cert. denied, 526 U.S. 1130, 119 S.Ct. 1802, 143 L.Ed.2d 1007 (1999)).

II.

We have held that the heightened scrutiny applied in Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982), is limited to "unique circumstances" that are absent here:

> In Plyler, the Supreme Court applied intermediate scrutiny to a statute that prohibited the disbursement of state funds for the education of the children of undocumented aliens. Plyler, however, expressly reaffirms the Court's holding in San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 35, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), that education is not a fundamental right and therefore that burdens on education are not subject to heightened scrutiny. It was the "unique circumstances" of a burden on education coupled with the disadvantaging of children of aliens that led to heightened scrutiny in Plyler, and the Court subsequently has expressly limited Plyler to those circumstances.

Philadelphia Police & Fire Assoc. for Handicapped Children, Inc. v. City of Philadelphia, 874 F.2d 156, 165

(3d Cir.1989) (quoting Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 459, 108 S.Ct. 2481, 101 L.Ed.2d 399 (1988)).

The Supreme Court has declined to extend Plyler's heightened scrutiny to other education cases. In Kadrmas, the Court addressed "the constitutionality under the fourteenth amendment equal protection clause of a school bus service user fee. The Court rejected Kadrmas' contention that those who could not afford the fee were denied equal access to education and that such a denial implicated heightened scrutiny." Philadelphia Police & Fire Assoc. for Handicapped Children, 874 F.2d at 165 n. 5. Notably, Kadrmas distinguished Plyler on the ground that the children in Plyler were innocent victims of their parents' illegal immigration:

> We have not extended [Plyler] beyond the "unique circumstances" that provoked its unique confluence of theories and rationales. Nor do we think that the case before us today is governed by the holding in Plyler. Unlike the children in that case, Sarita Kadrmas has not been penalized by the government for illegal conduct by her parents.

Kadrmas, 487 U.S. at 459 (citations and internal quotation marks omitted).

The youth covered by Subsection A are being punished as a result of their own illegal conduct, not because of the illegal conduct of their parents. Accordingly, the heightened scrutiny applied in Plyler is inappropriate here. Lacking a basis for heightened scrutiny, we must apply the rational basis review ordinarily applied to social and economic legislation.

"[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relationship to some legitimate end." Romer v. Evans, 517 U.S. 620, 631, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996). "In the ordinary case, a law will be sustained if it can be said to advance a legitimate government interest, even if the law seems unwise or works to the disadvantage of a particular group, or if the rationale for it seems tenuous." Romer, 517 U.S. at 632. Indeed, under rational basis review, legislation enjoys a presumption of validity, and the plaintiff must negate every conceivable justification for the classification in order to prove that the classification is wholly irrational. See Federal Communications Comm'n v. Beach Communications, 508 U.S. 307, 314-15, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993).

III.

The Defendants tender four justifications for the distinction Subsection A draws between county and state, adult institutions: "1) space limitations in county correctional institutions; 2) higher per-student cost in county correctional institutions; 3) security concerns that would arise in state correctional institutions if education were discontinued; and 4) the greater need for education in state correctional institutions, independent of security concerns." Appellant's Br.App. 34-35.

First, the record indicates that 13 of the 73 adult, county correctional facilities in Pennsylvania do not have sufficient space to provide a complete educational program, and the legislature may have determined that requiring a full educational program in these institutions

would require them to either preempt other services or to renovate at additional expense. Under rational basis review, a statute survives even if it is over-inclusive. Thus, if the legislature decides that space limitations in a fraction of the adult, county facilities justify the uniform limitation on education in adult, local facilities, that decision is not an irrational means of responding to the space concerns at some adult, local facilities.

Second, although some adult, county facilities have more school- aged inmates than state institutions, state facilities generally have higher youth populations. As the DOE Secretary puts it, "the legislature may have intended to reduce average per-pupil expenditures by not providing education to correctional facilities that house few convicted offenders, where per-pupil costs might well be higher." Appellant's Br.App. 38. While Plaintiffs perceive an inconsistency between this rationale and the decision to require school districts to pay for the education of all school-aged pre-trial detainees, all special education students, and all inmates in juvenile detention, we agree with the Defendants that a reasonable legislator might find these choices compatible. It is not irrational to require education regardless of location for pre-trial detainees because the guilt of these defendants has not been adjudicated and they thus could be seen as retaining Pennsylvania's general right to education. The legislature could also view education for special needs students as having a higher priority than education generally. Finally, the per-pupil cost in juvenile facilities may rationally be perceived as lower because the entire population is of school age. In each case, the necessity of legislative line-drawing "renders the precise coordinates of the resulting legislative judgment virtually unreviewable, since the

legislature must be allowed leeway to approach a perceived problem incrementally." Beach Communications, 508 U.S. at 316; see also Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955) ("Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of onefield and apply a remedy there, neglecting the others.").

Third, the record indicates that before Subsection A was enacted, inmates in state correctional institutions received full educational services while school-aged county inmates did not. The Secretary suggests that curtailing education in state facilities would raise security concerns not similarly raised in county facilities. It is not irrational to believe that the discontinuation of an existing program is more likely to engender inmate hostility than the failure to institute one that inmates have never experienced. A perceived difference in security risks provides a rational basis for Section A's distinction between state and local institutions.

Fourth, the legislature could have determined that the longer term youth population found in the statecorrectional system would benefit more from educational services than the more transient population found in county jails. An offender's term in a county correctional institution could be less than a school year, a situation that could not occur for a school-aged youth incarcerated in a state correctional institution. While it may be true, as Plaintiffs insist, that even short breaks in education can render a youth less likely to complete his

education, a legislature's non-arbitrary judgment about educational priorities is not subject to judicial second-guessing.

Thus, each of the justifications tendered by the Defendants provides a rational basis for the distinctions drawn by Subsection A . [FN1]

> FN1. This fact distinguishes this case from Romer v. Evans, 517 U.S. 620, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996), the Supreme Court's most recent case applying rational basis review and invalidating a statute on equal protection grounds. The Court there struck down a Colorado constitutional amendment barring the adoption--and mandating the repeal--of any state or local law specifically protecting homosexuals from discrimination. The Court explained that the amendment identified a classification of persons by a single trait and then disadvantaged that group "across the board" in all situations. Romer, 517 U.S. at 633. Because the amendment was "a status-based enactment divorced from any factual context," it was not possible to "discern a relationship to [any] legitimate state interests." Romer, 517 U.S. at 635. In contrast, juveniles convicted as adults and held in adult, county correctional facilities are not a group identified by a single trait, and the burden imposed on them by Subsection A is limited to a specific educational context that, as we have shown, enables us to discern a rational connection with legitimate state interests.

IV.

Because the Plaintiffs have not shown a reasonable probability that the statute will be overturned, the District Court did not abuse its discretion in denying their motion for preliminary injunction. The District Court's order of June 17, 1999, will be affirmed.

ROTH, Circuit Judge, dissenting:

I agree with the majority that the proper standard of review for this case is rational basis scrutiny. I disagree, however, that Subsection A, which restricts the educational opportunities available to school-age county inmates, survives a rational basis review. In my view, Pennsylvania's treatment of this category of prisoners is arbitrary and violates equal protection. For that reason, I respectfully dissent.

I.

The Equal Protection Clause of the Fourteenth Amendment prohibits a State from "deny[ing] to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Its central tenet requires that States treat like cases alike but may treat unlike cases differently. See Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982). To determine whether a particular classification meets this obligation, courts examine, with varying levels of scrutiny, the relationship between the government's objective and the means to achieve it. Absent the singling out of a suspect class, such as race or gender, or the infringement of a

fundamental right, courts apply the minimal level of scrutiny--rational basis review.

The rational basis standard requires that a State express a rational relationship between the classification and some legitimate government interest. I recognize that this standard poses a nearly insurmountable hurdle to parties challenging a particular statute, requiring them to prove that there is no rational relationship, actual or hypothetical, between the stated end and the classification. See FCC v. Beach Communications, Inc., 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). Moreover, statutory classifications may be drawn so that "reform may take one step at a time," permitting the legislature to "select one phase of one field and apply a remedy there, neglecting others." Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955).

In finding that Subsection A passes rational basis scrutiny, the majority relies almost exclusively on Lee Optical and Beach Communications, Inc., each of which reviewed the scope of economic regulation. As the majority observes, legislation that does not target a suspect class or infringe a fundamental right enjoys a presumption of validity and federal courts ought to tread lightly when reviewing a statute under this standard. See Maj. Op. at 7. Yet the majority's analysis bends too far to accommodate this standard.

I am aware of what rational basis review precludes. Under Lee Optical and its progeny, a court cannot second-guess the legislature's wisdom or its policy judgment. A court would overstep its boundaries if it were to invalidate a law because it thought the law was bad for the community or

because it believed that, in light of competing record evidence offering support for two options, the legislature made the wrong choice. See Beach Communications, Inc., 508 U.S. at 314 ("[J]udicial intervention is generally unwarranted no matter how unwisely [a court] may think a political branch has acted."). Nevertheless, making a legislative judgment "virtually unreviewable," id. at 316, does not make it nonjusticiable. Yet this is the practical effect of the majority's terse treatment of the Plaintiffs' plight.

There are limits to the deference owed to the legislature. As the Plaintiffs point out, the Supreme Court has applied rational basis scrutiny more circumspectly when legislation impinges on sensitive issues or controversial social policies. In such cases, the legislative classification must "find some footing in the realities of the subject addressed by the legislation." Heller v. Doe, 509 U.S. 312, 321, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (upholding Kentucky law imposing different burdens of proof for civil and criminal involuntary commitment procedures). Moreover, the State may not "rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 446, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985) (invalidating municipal ordinance requiring special use permit only for proposed group home for mentally retarded but not for other group homes). If the classification is motivated by invidious discrimination or if there is too flimsy a relationship between the means employed and the purported end, a court would be well within its authority to invalidate such a classification:

> The search for the link between classification and objective gives substance to the Equal

> Protection Clause; it provides guidance and discipline for the legislature, which is entitled to know what sorts of laws it can pass; and it marks the limits of our authority.... By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we ensure that classifications are not drawn for the purpose of disadvantaging the group burdened by the law.

Romer v. Evans, 517 U.S. 620, 632-33, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (invalidating Colorado ban on any official action designed to protect homosexuals from discrimination).

Subsection A's disparate treatment of school-age county inmates demonstrates a disconnect between the classification and its purported objective for several reasons. Most importantly, Pennsylvania law entitles individuals between 6 and 21 years of age to a free public education through high school. See 24 Pa. Stat. Ann. tit. 13, § 1301. Rights and benefits provided by a state law are subject to applicable constitutional constraint. See Goldberg v. Kelly, 397 U.S. 254, 262, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970) (requiring due process before termination of individual's federal and state welfare benefits). Although a state is not obligated to provide its citizens benefits such as education, when it elects to do so, it may not deny that benefit to some citizens for arbitrary reasons. See Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956) (invalidating state law that required purchase of transcript as precondition to appeal because no rational relationship between indigence and guilt). Moreover, while education is not a fundamental right,

laws affecting education may be distinguished from other social legislation because of education's "importance ... in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child." Plyler, 457 U.S. at 221. Thus, we ought not to allow education to be curtailed arbitrarily.

In addition, concern that an unpopular group is being singled out for discrimination is a cornerstone of equal protection analysis. See United States v. Carolene Products Co., 304 U.S. 144, 152-153 n. 4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938). While we do notconsider prisoners a suspect class, they represent a group to whom the legislature has limited political accountability. Yet political accountability is central to rational basis review:

> The Constitution presumes that ... even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.

Vance v. Bradley, 440 U.S. 93, 97, 99 S.Ct. 939, 59 L.Ed.2d 171 (1979) (upholding mandatory retirement age of 60 for Foreign Service employees). Thus, while certainly not requiring a heightened level of scrutiny, even under rational basis review, limited political accountability obligates a court to "insist on knowing the relation between the classification adopted and the object to be attained." Romer, 517 U.S. at 632.

Finally, the interest the State promotes must be legitimate. Invidious discrimination--whether motivated by antipathy or by a desire to harm a politically impotent group--is an illegitimate aim. See Cleburne, 473 U.S. at 447. Sometimes,

an improper motive is obvious. In Cleburne, it was the neighborhood's negative attitudes toward and fear of the mentally retarded. See id. at 448. In United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973), it was Congress's ulterior motive to prevent "hippies" from participating in the food stamp program. See id. at 534. Unlike Cleburne and Moreno, here we have no "smoking gun" that proves antipathy toward county-incarcerated, school-age prisoners. The cursory explanations that Pennsylvania's DOE offers to justify Subsection A's classifications, however, especially in reference to an important benefit like education, suggest an apathy that borders on antipathy. As such, Subsection A's isolation of this particular group of school-age inmates awakens my skepticism.

II.

Applying these concepts of rational basis review to Subsection A, I find that the Pennsylvania DOE relies on inconsistent, piecemeal rationalizations to justify its categorization that cordons off this single group of youth offenders. The application of Subsection A createsfive different categories of school-age inmates: county-incarcerated school-age inmates; state-incarcerated school-age inmates; pre-trial school-age detainees, wherever housed; school-age inmates requiring special education, wherever housed; and inmates of the juvenile detention system. Only county-incarcerated school-age inmates are treated as "expelled students." See 24 Pa. Cons.Stat. § 13-1306.2(a). I find that this categorization and the rationalizations offered for it lack "some footing in the realities of the subject addressed by the legislation." Heller,

509 U.S. at 321. A review of each of these classifications illustrates their arbitrariness.

The first classification is the distinction, on which the majority concentrates, between school-age convicts incarcerated in county facilities and those placed in state facilities. The Pennsylvania DOE offers four objectives to justify this distinction: (1) inadequate county facilities, (2) higher per- student costs to educate inmates confined to county facilities, (3) a comparatively greater need to educate state-incarcerated, school-age prisoners, and (4) security concerns in state facilities. I find that none of these justifications supports the denial to school-age county inmates of the educational benefits that their counterparts in state facilities receive.

With respect to the first justification, the Pennsylvania DOE does not argue that the county facilities have no space, only that it could be inconvenient for a few facilities to reschedule other programs or, in some instances, to accommodate the schooling of more school-age convicts. Obviously, however, these facilities have some space for educational use because classes are provided for pre-trial detainees and for special education students. Moreover, the space available must be flexible because the number of inmates presently eligible for schooling may fluctuate from day to day. There is no indication that the other school-age inmates in county facilities cannot be accommodated in that same space. Furthermore, when considering scheduling problems, the nature and impact of what is being scheduled cannot be ignored. I would hope that the scheduling of space for educational programs would be given some priority.

While rational basis review may not require a State to prove its justifications, it does afford challengers the opportunity to rebut these justifications. See Beach Communications, Inc., 508 U.S. at 315. In my view, the Plaintiffs have rebutted the "inadequate space" justification.

As for the second reason, the higher per-student cost in county facilities, a closer look also reveals its irrationality. Were Pennsylvania DOE really concerned about lowering the average cost of inmate education, no county inmates would be educated. The DOE tries to articulate why it is willing to incur higher costs for some county inmates, but not for others. First, it argues that pre-trial detainees, as opposed to convicted school-age inmates, may be educated because they have yet to be proven guilty. Not only is that rationale unrelated to the purported per-student cost objective, but it suggests that convicted state inmates should also be denied education, something the Plaintiffs have not requested. [FN1] Second, the DOE argues that special education students are required by federal law, [FN2] not state law, to receive a free education. But an obligation, arising under a federal statute, does not justify the arbitrary elimination of the state's own obligation to provide education to one group of students and not to another. Moreover, it begs the question why state-incarcerated inmates, who do not have learning disabilities, should be educated. In fact, given that the Pennsylvania DOE is educating two categories of school-age county inmates, it is more likely to achieve economies of scale and lower per-student cost by educating all three categories of school-age county inmates, rather than only the two. Moreover, technological developments, such as closed-circuit television, can facilitate the providing of

educational programs at a lower per-student cost, whether one, two, or three categories of inmates are selected to receive those programs.

> FN1. Whether guilt is relevant to retaining educational benefits raises a different question: What is rational about imposing an additional punishment on an inmate solely based on where he is incarcerated? Because Plaintiffs have not suggested, however, that the denial of education is an ex post facto punishment, I merely pose this question rhetorically.

> FN2. School-age individuals with special education needs are generally entitled to have their needs met through individualized educational programs at the state's expense under the Individuals with Disabilities Education Act. See 20 U.S.C. S 1400 et seq.

Fiscal integrity is a legitimate goal. States may not, however, achieve that goal by making invidious or arbitrary distinctions. See Zoebel v. Williams, 457 U.S. 55, 61-62, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982) (invalidating Alaska dividend distribution program because it favored established over new state residents). By randomly demonstrating a willingness to assume education costs for some county prisoners but not for others, the Pennsylvania DOE's rationales become arbitrary, and thus impermissible.[FN3]

> FN3. Plaintiffs also assert that the cost argument is a red herring because the school districts receive an allocation to cover educational costs for all students residing in a particular district, including those incarcerated in a county correctional facility. See Appellant's Br. at 46- 49. See also 24 Pa. Cons.Stat. S 13-1306.2(c) which appears to bear out this assertion: (c) The department shall effectuate necessary

> procedures for the transfer of funds from the school district of residence to the school district in which the local correctional institution is located. In effectuating the transfer of funds, the department may deduct the appropriate amount from the Basic Education Funding allocation of any school district which had resident students who were provided educational services in the local correctional facility.

The third objective, the greater need to educate inmates in state facilities, fails too for the reasons Plaintiffs assert. First, the argument that the county inmate population is too transient is subverted by the Pennsylvania DOE's decision to educate an even more transient class--pretrial detainees. Second, the notion that state inmates are incarcerated longer and thus are less likely to return to their education after their release from confinement is belied by the Plaintiffs' data. See e.g., 11/25/97 Tr. at 5-12; 83-88; Stipulated Facts P 5, P 54, P 59 (describing harmful effects of break in education of even one year).

Third, this rationale is undermined by the fact that it is the sentencing judge who determines whether school-age inmates, convicted as adults and sentenced to between two and five years, will be confined in a state or county facility. Thus, there will be some inmates in county facilities who are serving the same sentence as state inmates but not receiving the same educational benefit--and the only reason for the differential treatment is the discretion of the sentencing judge.[FN4] Combined, these inconsistencies make this objective not only arbitrary but fallacious.

> FN4. Under Pennsylvania law, felons sentenced to up to two years are housed in county facilities, those with sentences offive years or more are confined to state facilities, and those sentenced to between two and five years may be incarcerated

in either facility at the sentencing judge's discretion. See 42 Pa. Cons.Stat. S 9762.

The fourth objective, concern for security in state facilities, is irrelevant in the context of this case. As the District Court concluded, whatever the merits of Pennsylvania's overall concern about the role education plays in promoting security in state facilities, the Plaintiffs are not requesting that we deny state inmates their educational benefits. See Brian B., et al. v. Commonwealth of Pennsylvania, 51 F.Supp.2d 611, 633 (E.D.Pa.1999).

In sum, the Pennsylvania DOE's purported objectives are undermined by its decision to deny the educational benefits to county-incarcerated, school-age inmates that it is willing to provide to pre-trial detainees and to special education inmates in the same facilities. The reasons for distinguishing this category of school-age inmates in the county facilities are so unrelated to the purported objectives of limited space and higher per-student cost that they can only be arbitrary. As a result, the broader distinction between state and county inmates cannot itself withstand the limited scrutiny that rational basis review applies. These flawed justifications bear as little rational relationship to the statutory classification at hand as the reasons offered by the City of Cleburne to justify its differential treatment of the mentally retarded. See Cleburne, 473 U.S. at 448-50.

Finally, Plaintiffs attack the two remaining classifications: expelled students and convicted juvenile delinquents. The link to expelled students-- apparently Pennsylvania's attempt to insulate Subsection A from challenge- grants county-incarcerated, school-age inmates, under 17 years of age, the same minimal education benefits that expelled

students receive.[FN5] Yet, these two groups of school-age individuals are not similarly situated and thus should not be treated alike. A student is expelled from school when he violates school rules. As a consequence of his violation of school rules, an expelled student is denied a publicly funded education, a quid pro quo. He can still, however, obtain an education at his own expense. It is very unlikely, however, that the offense underlying the conviction of a county-incarcerated, school-age inmate was a violation of school rules. Moreover, county-incarcerated, school-age inmates cannot obtain an alternative education, privately funded or not, while in prison; and the reason for the denial of state-provided education is probably not related to the inmate's underlying offense. Thus, the relationship between expelled students and school-age county inmates is so attenuated as to render its linkage irrational.

> FN5. Expelled students under 17 years of age must receive a minimum education benefit while those over 17 years of age lose their entitlement to any education. See Pa.Code S 12.6(e). The local school districts have discretion to decide what constitutes the minimal benefit. See Ambreski v. Southeastern Sch. Dist. Bd. of Directors, 54 Pa.Cmwlth. 292, 421 A.2d 485, 488 (Pa.Commw.Ct.1980). This minimum amount ranges from as little as 90 minutes a week to a maximum of 5 hours a week. See Brian B, et al., 51 F.Supp.2d at 617-18.

Similarly, the distinction between confined juveniles and school-age county inmates lacks foundation. The District Court concluded that the juvenile justice system--as a distinct penal system--is primarily concerned with rehabilitation, so that providing its inmates an education furthers its primary objective. See Brian B., 51 F.Supp.2d at 630 n. 23. While sensible, this explanation does not go on to explain why state-incarcerated, school-age inmates convicted as adults receive education but county-

incarcerated ones do not. For that reason, the explanation must fail.

None of the objectives the Pennsylvania DOE offers can justify its isolating this one group of school-age county inmates. I find that the Plaintiffs have done what rational basis review requires of them: They have demonstrated that there is no rational relationship between the statutory classification and the purported government objectives. See Beach Communications, Inc., 508 U.S. at 315 ("[T]hose attacking the rationality of the legislative classification have the burden 'to negative every conceivable basis which might support it.' ") (quoting Lehnhausen v. Lake Shore Auto Parts, Co., 410 U.S. 356, 364, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973)). As a result, I would hold that Subsection A denies this class of school-age county inmates equal protection of the law.

III.

The majority characterizes the Pennsylvania DOE's set of piecemeal justifications as falling within Lee Optical's "one step at a time" rubric, which permits a legislature to conclude that only part of a problem needs to be solved initially, and under which courts defer to the legislature's discretion to decide which part that is. See Maj. Op. at 8-9. But the seeming coherence of this incremental approach is illusory. As the analysis above demonstrates, the rationales for distinguishing among county inmates are unrelated to cost and space. Nor do Pennsylvania's other purported reasons, such as inmate guilt or student expulsion, suggest an alternative policy or evil to link these disparate categories that set county-incarcerated, school-age inmates apart.

Nevertheless, despite the absence of a "reasonably conceivable state of facts that could provide a rational basis" for the categories, see Heller, 509 U.S. at 320 (citing Beach Communications, Inc., 508 U.S. at 313), the majority upholds the classifications with no more than a perfunctory review. See Maj. Op. at 7-10. As I read the cases, even when applying rational basis scrutiny, our task of "adjudication is not a mechanical exercise nor does it compel 'either/or' determinations." See Griffin, 351 U .S. at 26 (Frankfurter, J., concurring). Thus, while Lee Optical and Beach Communications, Inc., give states a wide berth to craft solutions to policy problems "one step at a time," they do not forbid our review of challenged social or economic legislation.

In conclusion, a state is not obligated by the federal Constitution to provide its citizens with a free public education. Once it decides to do so, however, it may not arbitrarily deny some of its citizen access to this benefit. In Pennsylvania's case, its hodgepodge of justifications for treating school-age county inmates differently than every other conceivable category of school-age prisoners, in adult or juvenile confinement, and treating them like expelled students, with whom they share no rational connection, amounts to just this type of prohibited arbitrary denial. As Justice Jackson once wisely observed, "we are much more likely to find arbitrariness in the regulation of the few than of the many." Railway Express Agency, 336 U.S. at 113. Pennsylvania's restriction of education to county-incarcerated, school-age inmates aptly proves this point.

I believe, therefore, that the Plaintiffs have shown a likelihood of success on the merits. Accordingly, I respectfully dissent and would remand this case to the

District Court for it to determine whether the Plaintiffs have satisfied the other elements required for a preliminary injunction.[FN6]

> FN6. Because the District Court concluded that the Plaintiffs were unlikely to prevail on the merits, it refrained from evaluating the other elements required for a preliminary injunction. See Brian B., 51 F.Supp.2d at 635.

**BRIAN B., et al.**

**v.**

**COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF EDUCATION, et al.**

**No. Civ.A. 96-7991.**

United States District Court,
E.D. Pennsylvania.

June 18, 1999.

Marsha L. Levick, Laval S. Miller-Wilson, Philadelphia, PA, Alyssa R. Fieo, Philadelphia, PA, for Brian B., by and through his mother, Lois B., Abdul R., by and through his mother, Dena R., Byron A., by and through his mother, Carrie W., Ronelle W., by and through his mother, Pamela J., Steven S., by and through his guardian, Nancy F., Jeremiah M., by and through his mother, Susan M., Anthony T., by and through his mother, Christine H., Kenneth R., by and through his mother, Nancy R., Plaintiffs.

Michael L. Harvey, Office of Attorney General, Harrisburg, PA, for Commonwealth of Pennsylvania Department of Education, Eugene Hickok, Defendants.

Natalie M. Habert, Beatty, Young, Otis and Lincke, Media, PA, for Garnet Valley School District, Defendant.

Robert T. Lear, Philadelphia, PA, for Philadelphia School District, Defendant.

Michael I. Levin, Michael I. Levin And Associates, P.C., Huntingdn Valley, PA, for Central York School District, Defendant.

OPINION

POLLAK, District Judge.

A Pennsylvania statute enacted in 1997, 24 P.S.A. § 13-1306.2(a), authorizes Pennsylvania school districts to withhold education from persons of school age who are incarcerated in county correctional institutions following conviction as adults. The statute states that "[a] person under twenty-one (21) years of age who is confined to an adult local correctional institution following conviction for a criminal offense who is otherwise eligible for educational services as provided under this act shall be eligible to receive educational services from the board of school directors in the same manner and to the same extent as a student who has been expelled...." Since students who have been "expelled" are only entitled to very meager "educational services," if any, the effect of this statute is to authorize the withholding of all or virtually all education from persons of school age who are incarcerated, pursuant to conviction, in county correctional institutions-- as distinct from persons of school age who are incarcerated, pursuant to conviction, in state correctional institutions or who are confined, pursuant to adjudication of delinquency, in juvenile detention facilities; state correctional institution inmates of school age and juvenile detention facility inmates of school age must be provided the same education guaranteed to all other Pennsylvania residents of school age. In their motion for a preliminary injunction restraining the enforcement of 24 P.S.A. § 13-

1306.2(a), plaintiffs claim that the statute's disparate treatment of those whom they view as similarly situated groups of inmates violates the equal protection clause. The extensive record developed by the parties on the motion for a preliminary injunction lends strong support to plaintiffs' contention that withholding education from any category of inmates of school age, pursuant to 24 P.S.A. § 13-1306.2(a), is a policy freighted with gravely detrimental social consequences. Nonetheless, I am not persuaded that there is a reasonable probability that at a final hearing on the merits I would conclude that this barely-arguably-penny-wise but almost-indisputably-pound-foolish statute is unconstitutional. Accordingly, I must deny the motion for a preliminary injunction.

## I. Facts and Procedural History

Plaintiffs are a class[FN1] of persons under the age of twenty-one presently confined in so-called "local [i.e., county] correctional institution[s]."[FN2] In December of 1996, Brian B. and five other young men brought this action against the Pennsylvania Department of Education, Department of Education Secretary Eugene Hickok ["Secretary Hickok" or "the Secretary"], and the school districts in which Delaware County Prison, Philadelphia House of Corrections, and York County Prison are located, alleging "violations of their rights to basic and special education as guaranteed them by the United States Constitution, federal statutes and state law." Amended Compl. at 1-2.[FN3]

FN1. On December 23, 1996, plaintiffs filed a motion for class certification pursuant to Fed.R.Civ.P. 23(b)(2) seeking to represent "all school-aged detainees, either awaiting trial or convicted, who were, or will be in the future, entitled to basic

and special education services under state and federal law, but were being denied such education either in part or absolutely." Plaintiffs' Post-trial Br. at 2-3. The motion was granted at the preliminary injunction hearing. See 11/25/97 Tr. at 167. In the interim between the filing of the class certification motion and the preliminary injunction hearing, the parties provisionally settled issues related to school-aged pretrial detainees and those convicted offenders entitled to special education. See Interim Agreement.

FN2. 24 P.S.A. § 13-1306.2(e) defines a "local correctional institution" as "any jail, prison or detention facility operated by a county or by a municipality. The term does not include any facility used for the detention or confinement of juveniles." Defendant Secretary of Education Eugene Hickok and the plaintiffs often speak of "county" (rather than "local") institutions when discussing the constitutionality of the statute, perhaps because 42 P.S.A. § 9762, which governs places of confinement, refers to "county" but not "local" institutions. Though the scope of 24 P.S.A. § 13-1306.2 appears wider than 24 P.S.A. § 9762-- encompassing, for instance, municipal jails--the evidence adduced and arguments presented in this court have uniformly referred to "county" correctional institutions.

FN3. In the original complaint, plaintiffs alleged violations of the Individuals with Disabilities Education Act ["IDEA"], 20 U.S.C. § 1400 et seq.; IDEA implementing regulations; Section 504 of the Rehabilitation Act of 1973 ["RA"], 29 U.S.C. § 794; RA implementing regulations; due process and equal protection guaranteed by the Fourteenth Amendment of the United States Constitution; and supplemental state claims sounding in the Pennsylvania Public School Code, 24 P.S.A. §§ 1-101 et seq. Subsequent to the filing of the original complaint, the IDEA and Pennsylvania Public School Code were amended; plaintiffs filed an amended complaint addressing the amendments.

The Pennsylvania Public School Code requires school districts to provide free educational services to persons

under the age of twenty-one residing within their boundaries.[FN4] When plaintiffs filed their original complaint, the Pennsylvania Public School Code generally required that, at the high school level, this education consist of five and a half hours of instruction per day--27.5 hours per week--for 180 days per year. No distinction was made between incarcerated and unincarcerated persons. 24 P.S.A. §§ 13-1306, 13-1306.2. Though the Public School Code did not distinguish between incarcerated and unincarcerated persons, practice did. Education was generally not provided to persons under the age of twenty-one incarcerated in county correctional institutions, though it was provided to persons of the same age incarcerated in state correctional institutions or held in juvenile facilities. After plaintiffs initiated this action challenging that practice, the Pennsylvania legislature amended the Public School Code to codify the practice. The pertinent Code provision--Section 13-1306.2(a)-- now reads in relevant part:

> FN4. Persons who have reached their sixth birthday but have neither reached their twenty-first birthday nor graduated from high school are entitled to a free education. 24 P.S.A. § 5-501; 24 P.S.A. § 13-1301. Persons who have reached their eighth birthday but have neither reached their seventeenth birthday nor graduated from high school are required to attend school. 24 P.S.A. §§ 13-1326, 13-1327.

> (a) A person under twenty-one (21) years of age who is confined to an adult local correctional institution following conviction for a criminal offense who is otherwise eligible for educational services as provided under this act shall be eligible to receive educational services from the board of school directors in the same

> manner and to the same extent as a student who has been expelled pursuant to section 1318.

24 P.S.A. § 13-1306.2(a). Expelled students under the age of seventeen are entitled to "some [educational] provision," 22 Pa.Code § 12.6--but "some" has been construed to be a minimal guarantee. See Abremski v. Southeastern Sch. Dist. Bd. of Directors, 54 Pa.Cmwlth. 292, 421 A.2d 485, 488 (1980). Expelled students who have reached their seventeenth birthday are not entitled to any education. 22 Pa.Code § 12.6. Thus, the effect of 24 P.S.A. § 13-1306.2(a) is to substantially curtail, or wholly eliminate, the educational entitlement of convicted county correctional institution inmates under the age of twenty-one.

In November of 1997--nearly a year after the initiation of this litigation-- plaintiffs entered into an Interim Agreement with the Pennsylvania Department of Education and Secretary Hickok [the "Commonwealth defendants"], after which plaintiffs and the Commonwealth defendants jointly requested that this court hold in abeyance all motions pending against the Commonwealth defendants with the exception of plaintiffs' "claims against Secretary Hickok challenging the constitutionality of 24 P.S.A. § [13-]1306.2(a) under the Equal Protection Clause of the Fourteenth Amendment and Plaintiffs' request that the Court enjoin the enforcement of 24 P.S.A. § [13-]1306.2(a)." Interim Agreement ¶ 10. An order to this effect was entered on November 24, 1997. The sole question now before this court is whether plaintiffs are entitled to a preliminary injunction pending a full trial determining whether 24 P.S.A. § 13-1306.2(a) violates the equal protection clause.

Because questions of justiciability have been raised, it may be useful to review events leading up to the preliminary injunction hearing. Plaintiffs filed their motion for a preliminary injunction on May 21, 1997. Over the next two months, each school district filed a separate response, and the Commonwealth defendants filed a joint response. On August 26, 1997, plaintiffs filed an amended complaint; shortly thereafter, the Commonwealth defendants filed a motion to dismiss, as did each of the three school districts. On November 10, 1997, the plaintiffs and the Commonwealth defendants executed the Interim Agreement referred to in the previous paragraph. The Interim Agreement provisionally resolved all claims related to special education and to the basic education of pretrial detainees. Prior to the scheduled hearing on the motion for a preliminary injunction, the plaintiffs and the Commonwealth defendants--but not the individual school districts--filed pre-trial briefs.

A telephone conference was held on November 21, 1997, during which this court discussed, with all parties, procedural matters related to the upcoming preliminary injunction hearing. In this telephone conference, the local school districts expressed their willingness to rest on the Commonwealth defendants' defense of § 13-1306.2(a), and it was decided that the school districts' presence at the preliminary injunction hearing was not essential, though they were welcome to attend. The preliminary injunction hearing began on November 24, 1997, with counsel for the plaintiffs, the Commonwealth defendants, and the Central York School District present. The plaintiffs and the Commonwealth defendants submitted a joint stipulation to over a hundred facts, as well as a series of stipulated documents. None of the individual school districts

contested the accuracy or authenticity of any of the information or documents set forth in the stipulations. On the first day of the hearing, the Commonwealth defendants argued--as they had not in their motion to dismiss plaintiffs' amended complaint--that there was no case or controversy between the plaintiffs and them. See 11/24/97 Tr. at 36-57.

The next day, at the close of plaintiffs' case-in-chief, the Commonwealth defendants resumed their argument that the case was not justiciable with respect to them. I did not rule on the issue at that time, and instead invited counsel for the Philadelphia School District and Garnet Valley School District to join the proceedings. Because the school districts remained parties to the action and there was a possibility that the Commonwealth defendants would be determined not to be proper defendants, I informed the school districts that, should the Commonwealth defendants prevail on their claim of nonjusticiability and hence be dismissed as defendants, the school districts would be entitled to cross-examine plaintiffs' witnesses and present any case-in-chief that they wished to present. See 11/25/97 Tr. at 169-71.[FN5] Near the end of that discussion, plaintiffs conceded that, pursuant to the Eleventh Amendment, the Pennsylvania Department of Education (PDE) was not a proper defendant, leaving Secretary Hickok the sole defendant as to plaintiffs' claims for injunctive and declaratory relief with respect to state authorities.[FN6]

> FN5. Central York School District twice stated that it adopted the substantive defense of Secretary Hickok. See 11/25/97 Tr. at 51-52; Central York School District's Reply Mem. of Law in Opp. to Pl. Mot. for Prelim. Inj. at 2. The Philadelphia School District did not express any desire to mount a

separate constitutional defense, and noted that it sought "guidance and closure," rather than the opportunity to mount further defenses. See 11/25/97 Tr. at 154-55. Garnet Valley School District expressed no opinion on the matter.

FN6. Accordingly, this opinion refers to "the Commonwealth defendants" up to the point--late in the second day of the preliminary injunction hearing--at which the plaintiffs conceded the PDE's immunity; it refers to "Secretary Hickok"--rather than "the Commonwealth defendants"--after the concession, since the PDE was no longer a proper defendant.

In all, the preliminary injunction hearing took two days, during which four witnesses testified and dozens of exhibits were introduced. Following preparation of a transcript of the hearing, the plaintiffs and two of the defendants--Central York School District and Secretary Hickok--submitted post-trial memoranda. At my request, the plaintiffs and Secretary Hickok prepared a supplemental set of fact stipulations, related to the legislative history of § 13-1306.2 and to Pennsylvania law and practice regarding commitment to and transfer between county and state prisons. Those supplemental stipulations were filed on February 19, 1998. I address the motion for preliminary injunction in light of the entire evidentiary record.

A.

In Pennsylvania, persons who have not yet reached their twenty-first birthday ("school-aged persons") can be tried as alleged delinquents by a juvenile court or tried as alleged adult criminals in a criminal court. Under Pennsylvania law, the juvenile court generally has jurisdiction over a "child" accused of criminal offenses. The Pennsylvania Juvenile Act defines "child" as a person:

> under the age of 18 years [or] under the age of 21 years who has committed an act of delinquency before reaching the age of 18 years; or [who] was adjudicated dependent before reaching the age of 18 years and who, while engaged in a course of instruction or treatment, requests the court to retain jurisdiction until the course has been completed, but in no event shall a child remain in a course of instruction or treatment past the age of 21 years.

42 P.S.A. § 6302.

A child charged with delinquency in a juvenile court will, if adjudicated delinquent and found in need of custodial instruction or treatment, be confined in a juvenile facility. If convicted as an adult, the child will, if sentenced to incarceration, be sentenced in the same way as any adult person convicted in criminal court.[FN7]

> FN7. A juvenile court may transfer a proceeding concerning a child who "was 14 or more years of age at the time of the alleged conduct" to criminal court if the juvenile court determines, following consideration of several statutorily mandated factors, that the public interest is served by the transfer. 42 P.S.A. § 6355(a)(4) (requiring a transferring court to have found existence of a prima facie case; that the "act would be considered a felony if committed by an adult"; "that there are reasonable grounds to believe that the public interest is served by the transfer" (a category further delineated); and "that there are reasonable grounds to believe that the child is not committable to an institution for the mentally retarded or mentally ill"). In addition, a juvenile court must transfer a proceeding concerning a child who "was 14 or more years of age at the time of the alleged conduct" to criminal court if the child is accused of murder "or any of the offenses excluded from paragraph 2(ii) or (iii) of the definition of 'delinquent act ' in section 6302 (relating

> to definitions)." 42 P.S.A. § 6355(e) (emphasis in original). Paragraph 2(ii) of 42 P.S.A. § 6302 excludes from the definition of 'delinquent act' "[a]ny of the following prohibited conduct where the child was 15 years of age or older at the time of the alleged conduct and a deadly weapon ... was used during the commission of the offense, which, if committed by an adult, would be classified as" rape; involuntary deviate sexual intercourse; aggravated assault; robbery; robbery of motor vehicle; aggravated indecent assault; kidnapping; voluntary manslaughter; and an attempt, conspiracy or solicitation to commit murder or any of the foregoing crimes. Paragraph 2(iii) of 42 P.S.A. § 6302 excludes from the definition of 'delinquent acts' "[a]ny of the following prohibited conduct where the child was 15 years of age or older at the time of the alleged conduct and has been previously adjudicated delinquent of any of the following prohibited conduct which, if committed by an adult, would be classified as" rape; involuntary deviate sexual intercourse; robbery; robbery of motor vehicle; aggravated indecent assault; kidnapping; voluntary manslaughter; and an attempt, conspiracy or solicitation to commit murder or any of the foregoing crimes.

A person ordered incarcerated by a Pennsylvania criminal court may be sent to either a county or state correctional institution, depending on the length of sentence. A person sentenced to a maximum term of less than two years must serve his sentence in a county correctional institution within the jurisdiction of the court. 42 P.S.A. § 9762(3). A person sentenced to a maximum term of five years or more must serve his sentence in a state correctional facility. 42 P.S.A. § 9762(1). A person sentenced to a maximum term of between two and five years may be committed to either a state correctional institution or a county correctional institution. 42 P.S.A. § 9762(2). "[T]he decision whether to place prisoners sentenced to a maximum period of two (2) years or more but less than five (5) years in a county facility or ... in a state facility, 'is within the sound

discretion of the trial judge.' " Commonwealth v. Stalnaker, 376 Pa.Super. 181, 545 A.2d 886, 888 (1988) (quoting County of Allegheny v. Commonwealth, 507 Pa. 360, 490 A.2d 402, 412 (1985)).

B.

Under Pennsylvania law, persons who have reached their sixth birthday but have neither reached their twenty-first birthday nor graduated from high school are entitled to a free education. 24 P.S.A. § 5-501; 24 P.S.A. § 13- 1301. Persons who have reached their eighth birthday but have neither reached their seventeenth birthday nor graduated from high school are required to attend school. 24 P.S.A. §§ 13-1326, 13-1327. At the high school level, school districts are required to provide 27.5 hours of instruction a week and 180 days of instruction per year. 24 P.S.A. § 15-1504.

There are several exceptions to these general rules. School districts are not required to provide the weekly 27.5 hours of education to students who have been expelled, who are homebound, or who are incarcerated, pursuant to conviction, in a county correctional institution. "Students who are less than 17 years of age are still subject to the compulsory school attendance law even though expelled, and they must be provided an education." 22 Pa.Code § 12.6(e). "[T]he student's school district has the responsibility to make some provision for the child's education." 22 Pa.Code § 12.6(h). The term "some provision" has been construed to mean that "local school officials [may] determine the amount and type of alternate instruction necessary and appropriate in each case." Abremski v. Southeastern Sch. Dist. Bd. of Directors, 54

Pa.Cmwlth. 292, 421 A.2d 485, 488 (1980) (finding one weekly ninety-minute in-school session as augment to home-study plan adequate for expelled student under age seventeen). There does not appear to be any educational entitlement for expelled students who have reached their seventeenth birthday. Homebound students engaged in a home study program commonly receive no more than five hours of instruction per week. See 22 Pa.Code § 11.25(b)-(c); 11/24/97 Stipulated Facts ¶¶ 91, 93.

The statute challenged in this case--24 P.S.A. § 13-1306.2(a)--limits the schooling provided to school-aged persons incarcerated, pursuant to conviction, in county correctional facilities to the quantum of education provided throughout the Commonwealth to "expelled students."[FN8] As described above, "expelled" students who are sixteen or younger are entitled to have "some provision" made for their education; those who are seventeen to twenty do not appear to be entitled to any education. While as little as ninety minutes a week of in-school education has been deemed sufficiently augmentative of a home-based plan to constitute "some provision," see Abremski, 421 A.2d at 488, school districts routinely apply "for payment of up to five hours of instruction per week for each student receiving homebound instruction," 11/24/97 Stipulated Facts ¶ 93; "[h]omebound instruction is also provided by school districts when a student is expelled from school," 11/24/97 Stipulated Facts ¶ 94.[FN9] On these facts, it appears to be a fair inference that, by virtue of § 13-1306.2(a), persons who are sixteen or younger and are incarcerated pursuant to conviction in county correctional institutions are likely to receive as much as, but almost assuredly no more than, five hours of instruction per week.

FN8. The statute's impact has been somewhat modified by Secretary Hickok's agreement with plaintiffs that school-aged inmates eligible for special education should not have their schooling curtailed. School-aged persons incarcerated (pre-trial or post-conviction) in county institutions who have special educational needs are generally entitled to a free appropriate public education pursuant to an individualized education program under the Individuals with Disabilities Education Act ["IDEA"], 20 U.S.C. § 1400 et seq. In the Interim Agreement Between Plaintiffs and Defendants Eugene Hickok and Pennsylvania Department of Education (11/10/97) ["Interim Agreement"], the Commonwealth defendants agreed to fulfill their obligations under the Individuals with Disabilities in Education Act, 14 U.S.C. § 1400 et seq., notwithstanding the language of 24 P.S.A. § 13-1306.2, which does not differentiate between students who are entitled to special education and those who are not. See Pennsylvania Department of Education, Basic Education Circular--Education Services for Students Incarcerated in Local Correction Institutions § II (Jan. 15, 1998).

FN9. 24 P.S.A. § 13-1306.2(b) establishes that pre-trial detainees in county facilities are eligible for educational services in the same manner as disruptive students. "Alternative education programs for disruptive youth may operate outside the normal school day" and may alter the day or hour requirements of the Public School Code; all such alternative education programs must nevertheless "permit students to make normal academic progress and achieve requirements for graduation...." See Pennsylvania Department of Education, Basic Education Circular--Education Services for Students Incarcerated in Local Correction Institutions § I.A. (Jan. 15, 1998). The educational entitlement of pre-trial detainees is not contested at this time. See Interim Agreement.

By contrast, school-aged persons who have been convicted of a crime and are incarcerated in state correctional institutions are provided full-time schooling, which

consists of five and a half hours of daily instruction year-round. 11/24/97 Stipulated Facts ¶ 49. School-aged persons in juvenile facilities are provided five and a half hours a day of instruction for 180 days a year. 11/24/97 Stipulated Facts ¶ 62. The Secretary has acknowledged that the Individuals with Disabilities Education Act ["IDEA"], 20 U.S.C. § 1400 et seq., entitles school-aged persons who have special educational needs-- whether or not incarcerated in county institutions--to a free appropriate public education pursuant to an individualized education program under the IDEA. See Interim Agreement; see also Pennsylvania Department of Education, Basic Education Circular--Education Services for Students Incarcerated in Local Correction Institutions § II (Jan. 15, 1998).[FN10]

FN10. See supra note 8.

The amount of basic educational services provided to a school-aged person who has been charged with or convicted of a crime therefore depends upon: 1) whether the person is adjudicated as a delinquent juvenile or convicted as an adult; 2) whether the person is assigned to a county or state correctional institution; and 3) the person's age. In sum, local school districts may withhold all or nearly all basic educational services from convicted school- aged persons who are incarcerated in county correctional institutions; but basic educational services may not be withheld from (a) convicted school-aged persons incarcerated in state correctional institutions, (b) juvenile delinquents housed in state or county juvenile facilities, or (c) pretrial detainees incarcerated in any sort of correctional facility.[FN11]

FN11. See supra note 9.

II. Presence of a Justiciable Case or Controversy

Secretary Hickok argues that there is no case or controversy between him and the plaintiff class. Commonwealth Def. Post-Trial Br. at 27. For support, the Secretary points to 1st Westco Corp. v. School Dist. of Philadelphia, 6 F.3d 108 (3d Cir.1993). 1st Westco was a law suit precipitated by a decision of the Philadelphia School District that a contractor's use of out-of- state employees on school projects violated a section of the Pennsylvania Public School Code. The contractor sued the School District, claiming that the statute relied on by the School District was constitutionally infirm, and the School District then filed a third-party complaint against two high-ranking Commonwealth officials: the Secretary of Education and the Attorney General. In the third-party complaint, the School District asserted that it had--some years before--asked the Secretary whether the statute was constitutional. The Secretary had asked the Attorney General whether the statute was constitutional, and the Attorney General had informed the Secretary that the statute was constitutional and that the Secretary was bound to enforce it. On appeal, the Third Circuit held that there was no case or controversy between the School District on the one hand and the Secretary and the Attorney General on the other. With respect to the Secretary the court found that, although the Secretary was charged--as head of the Department of Education--with the duty of enforcing the statute in every other school district in the state, he had no such duty with respect to the Philadelphia School District; this was because "the state legislature, for reasons best known to them, limited

this authority to review and approve specifications to second, third, and fourth class school districts and excluded Pennsylvania's first class school district. 24 Pa.Stat.Ann. § 7-731. Philadelphia is Pennsylvania's only first class school district. Id. at § 2-202. Thus the Secretary has no statutory power to enforce section 754 against the School District." Id. at 113. The Attorney General was found to be even remoter from the fray.[FN12]

> FN12. The court held that there was no case or controversy between the School District and the Attorney General for the reason that the Attorney General did not have a "duty to enforce" the challenged statute: he was merely "bound to issue opinions to the heads of state agencies"--a category within which the School District did not fall. 6 F.3d at 113.

This case is different in two salient respects. First, the Secretary is not a third-party defendant haled into court by a school district alleging it relied on a constitutional opinion rendered years earlier. Secretary Hickok is a named defendant whose issuance of a Basic Educational Circular [FN13] outlining local school districts' responsibilities under § 13-1306.2(a) was disseminated promptly after the statute was passed. Second, the Pennsylvania General Statutes charge the Secretary of Education with "administer[ing] all of the laws of this Commonwealth with regard to the establishment, maintenance, and conduct of the public schools...." 71 P.S.A. § 352(a). To carry out his duties, the Secretary has been delegated substantial enforcement authority; he may, for example, "prescrib[e] penalties" for violations of the school laws. Id.; see also 11/24/97 Tr. at 38. Moreover, Secretary Hickok is authorized to "prescribe, alter and amend basic criteria" of the Commonwealth's statewide educational plan, and is specifically required to ensure that

those criteria are in accord with "all applicable laws and regulations of the Federal government." 71 P.S.A. § 366. Unlike 1st Westco--where the Secretary's general power to penalize a school district for failure to follow contracting rules did not extend to the Philadelphia School District--this case involves a Secretary whose general power to "prescrib[e] penalties" against those school districts that fail to abide by the law extends to the school districts whose actions are at issue. See 71 P.S.A. § 352(a). Secretary Hickok is thus a proper defendant.

> FN13. Basic Education Circulars are Department of Education policy statements intended to provide statewide guidance on a particular topic to local school districts.

## III. The Preliminary Injunction Motion

### A. Standard for Issuance of a Preliminary Injunction

The Third Circuit has stated:

> Four factors govern a district court's decision whether to issue a preliminary injunction: (1) whether the movant has shown a reasonable probability of success on the merits; (2) whether the movant will be irreparably injured by denial of the relief; (3) whether granting preliminary relief will result in even greater harm to the nonmoving party; and (4) whether granting the preliminary relief will be in the public interest.

American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Bd. of Educ., 84 F.3d 1471, 1477 n. 2 (3d Cir.1996) (en banc ). See also Allegheny Energy, Inc. v. DQE, Inc., 171 F.3d 153, 158 (3d Cir.1999). "A district court should endeavor to balance these four factors to determine if an injunction should issue." Allegheny

Energy, 171 F.3d at 158 (citing American Civil Liberties Union of New Jersey, 84 F.3d at 1477 n. 2.).

B. Likelihood of Success on the Merits
1. Standards of Scrutiny

"[N]or [shall any State] deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The equal protection clause "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." Vacco v. Quill, 521 U.S. 793, 799, 117 S.Ct. 2293, 2297, 138 L.Ed.2d 834 (1997) (citing Plyler v. Doe, 457 U.S. 202, 216, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982)). This case requires consideration of the justifications advanced by the defendants (chiefly, Secretary Hickok) for Pennsylvania's unlike treatment of two categories of persons said by the plaintiffs to be alike: school-aged inmates of county correctional institutions and school-aged inmates of other correctional institutions.

Most laws make classifications, but not all classifications violate the equal protection clause. As the Supreme Court explained in Personnel Administrator of Mass. v. Feeney, the "Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must co-exist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." 442 U.S. 256, 271-272, 99 S.Ct. 2282, 60 L.Ed.2d 870 (1979). The Court has thus "attempted to reconcile the principle with the reality by stating that, if a law neither burdens a fundamental right nor targets a suspect class," a legislative classification will be upheld "so long as it bears a rational relation to some legitimate end." Romer v. Evans, 517 U.S. 620, 631, 116

S.Ct. 1620, 134 L.Ed.2d 855 (1996). This verbal formulation characterizes the "rational basis" test. See also Tolchin v. Supreme Court of New Jersey, 111 F.3d 1099, 1113 (3d Cir.1997) (under "rational basis review ... a law need only be rationally related to a legitimate state interest.").

Classifications that do burden a fundamental right or target a suspect class are subjected to strict scrutiny. Clark v. Jeter, 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988). Suspect classes include race, McLaughlin v. Florida, 379 U.S. 184, 191-92, 85 S.Ct. 283, 13 L.Ed.2d 222 (1964), national origin, Oyama v. California, 332 U.S. 633, 644-46, 68 S.Ct. 269, 92 L.Ed. 249 (1948), and alienage, Graham v. Richardson, 403 U.S. 365, 372, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971). "Fundamental" rights include some rights, such as freedom of religion, speech and the press, specified in the Bill of Rights, and certain others, such as voting, not specified in the Bill of Rights. See, e.g., Harper v. Virginia Bd. of Elections, 383 U.S. 663, 672, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966); see also Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969). To survive strict scrutiny, classifications burdening a fundamental right or targeting a suspect class must be "suitably tailored to serve a compelling state interest." City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Accord Plyler v. Doe, 457 U.S. 202, 217, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982) (describing test as "precisely tailored to serve a compelling government interest").

While the strict scrutiny and rational basis tests describe the poles of the Court's equal protection clause

jurisprudence, there is also a middle ground variously described as "heightened" or "intermediate" scrutiny. See Clark, 486 U.S. at 461, 108 S.Ct. 1910 ("Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny...."). The Supreme Court has applied this middle-ground analysis to classifications based on "sensitive" characteristics such as gender, see, e.g., United States v. Virginia, 518 U.S. 515, 116 S.Ct. 2264, 135 L.Ed.2d 735 (1996) and illegitimacy, see, e.g. Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175, 92 S.Ct. 1400, 31 L.Ed.2d 768 (1972). To survive "heightened" or "intermediate" scrutiny,

> the party seeking to uphold a statute ... must carry the burden of showing an exceedingly persuasive justification for the classification. The burden is met only by showing at least that the classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.

Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724, 102 S.Ct. 3331, 73 L.Ed.2d 1090 (1982) (internal citations and footnote omitted).[FN14]

> FN14. The Court has itself had occasion to question whether the three-tier structure accurately describes the decisional process. See United States Railroad Retirement Board v. Fritz, 449 U.S. 166, 176-77 n. 10, 101 S.Ct. 453, 66 L.Ed.2d 368 (1980) (describing eleven cases in which the Court applied rational basis test and concluding that Court had not "applied a uniform or consistent test under equal protection principles."). Individual justices writing separately have echoed the full Court's questions, occasionally proposing a different analytical framework while doing so. See, e.g., Cleburne, 473 U.S. at 451, 105 S.Ct. 3249 (Stevens, J.,

concurring, joined by Burger, C.J.) ("I have never been persuaded that [the three-tier scrutiny structure] adequately explain[s] the decisional process."); Craig v. Boren, 429 U.S. 190, 220-221, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976) (Rehnquist, J., dissenting) ("How is this Court to divine what objectives are important? How is it to determine whether a particular law is 'substantially' related to the achievement of such objective, rather than related in some other way to its achievement? Both of the phrases used are so diaphanous and elastic...."); San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 98, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) (Marshall, J., dissenting, joined by Douglas, J.) (criticizing "the Court's rigidified approach to equal protection analysis"). Some commentators, seeing the three-tier framework as more rigid than elastic, at least as applied, have argued that the choice of the standard of scrutiny is more important than the subsequent analysis, since the scrutiny standard is likely to determine outcome. Fullilove v. Klutznick, 448 U.S. 448, 507, 100 S.Ct. 2758, 65 L.Ed.2d 902 (1980) (Powell, J., concurring) (noting that some commentators "wonder whether our review of racial classifications has been strict in theory, but fatal in fact." (citing Gunther, The Supreme Court, 1971 Term--Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for Newer Equal Protection, 86 Harv.L.Rev. 1, 8 (1972))).

The three-tier structure nevertheless remains intact, if not as rigid as some of its detractors have suggested. The Court has expressly disavowed any intimation that the choice of the scrutiny standard somehow determines the outcome of the scrutiny. "[W]e wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact." Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237, 115 S.Ct. 2097, 132 L.Ed.2d 158 (1995). Likewise, the Court has shown that the application of rational basis scrutiny does not invariably lead to the conclusion that a challenged statute has not violated the equal protection clause. See Hooper v. Bernalillo Cty. Assessor, 472 U.S. 612, 105 S.Ct. 2862, 86 L.Ed.2d 487 (1985) (property tax benefit for Vietnam veterans); Zobel v. Williams, 457 U.S. 55, 102 S.Ct. 2309, 72 L.Ed.2d 672 (1982) (statutory dividend plan favoring longtime state residents);

Cleburne, 473 U.S. at 435, 448, 105 S.Ct. 3249 (zoning restriction on group homes for mentally disabled persons); see also id. at 451, 452, 455, 105 S.Ct. 3249 (Stevens, J., concurring, joined by Burger, C.J.). Cf. Attorney Gen'l of New York v. Soto-Lopez, 476 U.S. 898, 912, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986) (Burger, C.J., concurring) (civil service preference for Vietnam veterans); id. at 916, 106 S.Ct. 2317 (White, J., concurring). While selecting the appropriate standard of scrutiny sets the starting positions for the contest, it is the scrutiny itself--a scrutiny that looks hard at the facts--which determines the victor.

2. Standard of Scrutiny in Education Cases

The Supreme Court has wrestled with the appropriate standard of scrutiny in four cases in which plaintiffs who were not members of a suspect class alleged denial of education or denial of access to education. As the Court itself has stated, it "has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review." Papasan v. Allain, 478 U.S. 265, 285, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986). Because those four cases--San Antonio Ind. Sch. Dist. v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), Plyler v. Doe, 457 U.S. 202, 102 S.Ct. 2382, 72 L.Ed.2d 786 (1982), Papasan, and Kadrmas v. Dickinson Pub. Schools, 487 U.S. 450, 108 S.Ct. 2481, 101 L.Ed.2d 399 (1988)--play such an important part in the choice of the appropriate scrutiny standard, I analyze them in some detail.

Rodriguez was the first such case. In Rodriguez, a class of Mexican American students challenged that part of the Texas public school financing system that relied on local property taxes. The plaintiff students claimed that,

because they lived in poorer school districts, their schools received less educational funding and hence they received less education. Seeking to convince the Court to analyze the funding disparities under strict scrutiny, plaintiffs claimed that a fundamental right to education was implicit in the Constitution. Over the dissent of four Justices, the Court, speaking through Justice Powell, rejected the plaintiffs' claim. While not disputing plaintiffs' contention that education was a necessary prerequisite to the manifestly fundamental rights of speech and voting, Justice Powell observed that "we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice." 411 U.S. at 36, 93 S.Ct. 1278 (emphasis in original). The Court acknowledged that it was not determining whether "some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise" of either the right to speech or vote, and went on to say:

> Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where--as is true in the present case--no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

Id. at 37, 93 S.Ct. 1278.

In Plyler, the Court again had the opportunity to address the issue left open by Rodriguez --whether a state "financing system [that] occasioned an absolute denial of educational opportunities to any of its children" could be constitutional. Plyler was initiated by a class of undocumented alien children challenging a Texas statutory system that authorized local school districts to deny free enrollment to undocumented alien children and withheld state funds for the education of such children. Though Rodriguez had held open the possibility of finding a fundamental right in such a context, the Plyler Court chose not to consider whether such a right existed. Instead, the Court applied a standard of review less demanding than strict scrutiny but more demanding than rational basis scrutiny. The Plyler standard of review--which has subsequently been variously termed "intermediate scrutiny" and "heightened scrutiny"--was defined by the Plyler Court as requiring a determination of whether "the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State." 457 U.S. at 217-18, 102 S.Ct. 2382.[FN15]

> FN15. The standard of review described in Plyler appears to have been novel. See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-32, at 1602-03 (2d ed.1988) (cataloguing forms of "intermediate review" and referring to the Plyler formulation as "a new form of heightened scrutiny.").

Several factors suggested to the Plyler Court that scrutiny more demanding than rational basis was appropriate in the context of a denial of education. First, the Court, while acknowledging that a state might be able to "withhold its

beneficence" from undocumented aliens, saw no rational justification for withholding education from the children of undocumented aliens, who (unlike their parents) had no power over their disabling status. Vis-a-vis their similarly situated peers receiving free education in the Texas public schools, the undocumented alien children were innocent. Second, the Court stressed "the importance of education in maintaining our basic institutions." 457 U.S. at 221, 102 S.Ct. 2382. Third, the Court weighed the significance of "the lasting impact" of an educational deprivation "on the life of the child." 457 U.S. at 221, 102 S.Ct. 2382. Considering the second and third concerns in tandem, the Court noted that education was not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation." Id. A legislature's choice to deprive "the children of any disfavored group of an education ... [forecloses] the means by which that group might raise the level of esteem in which it is held by the majority." Id. at 222, 102 S.Ct. 2382. Because the Texas statutory system imposed "a lifetime hardship ["the stigma of illiteracy"] on a discrete class of children not accountable for their disabling status," heightened scrutiny was appropriate. Id. at 223, 102 S.Ct. 2382.

> In determining the rationality of [the Texas statute], we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in [the Texas statute] can hardly be considered rational unless it furthers some substantial goal of the State.

Id. at 223-24, 102 S.Ct. 2382. Over a four-Justice dissent, the Court analyzed the statute under that standard and found it wanting. Id. at 227- 30, 102 S.Ct. 2382.

Shortly thereafter, in Papasan v. Allain, 478 U.S. 265, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986), a class of Mississippi schoolchildren and local school officials from more modestly funded districts sought to end funding disparities caused by the state's distribution of land trust funds. Plaintiffs alleged that the funding disparities denied them the minimally adequate education provided to children in other areas of the state, and argued that the state had infringed a fundamental right to a minimally adequate education. Id. at 284-85, 106 S.Ct. 2932. The Court noted that Plyler had not "foreclose[d] the possibility that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either the right to speak or the right to vote." Id. at 284, 106 S.Ct. 2932 (internal citations, quotation marks, and bracketsomitted). Acknowledging the uncertainty without clarifying it, the Papasan Court stated that "this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review." Id. at 285, 106 S.Ct. 2932. Finding, however, that the plaintiffs had not alleged any facts that supported their claim of being deprived of a minimally adequate education, the Court remanded for analysis under the rational basis test. Id. at 286, 106 S.Ct. 2932.

Two years later the Court considered Kadrmas, a case in which a student challenged the constitutionality of a North Dakota statute that allowed some school districts, but not others, to charge a fee for riding a bus to school. Though Kadrmas argued that the statutory structure denied her access to a minimally adequate education, the Court noted that she had arranged other transportation and continued

attending public school even after she was prevented from using the bus. Because the plaintiff was actually attending school, the Court found, there could not have been any denial of access to a minimally adequate education; indeed, plaintiff's education had not been abridged at all. 487 U.S. at 458, 108 S.Ct. 2481. The Court construed Kadrmas's claim as an argument that the equal protection clause prevented the state from permitting a school bus fee that imposes a greater burden on the poor.

In determining the relevant standard of review, the Kadrmas Court turned to Plyler, noting that it had "not extended [Plyler 's] holding beyond the 'unique circumstances,' [Plyler, 457 U.S. at 239, 102 S.Ct. 2382] (Powell, J., concurring), that provoked its 'unique confluence of theories and rationales,' [id. at 243, 102 S.Ct. 2382] (Burger, C.J., dissenting)." 487 U.S. at 459, 108 S.Ct. 2481. The Court then distinguished Kadrmas's claim from the class of undocumented aliens on three grounds. First, Kadrmas was not being "penalized by the government for illegal conduct by her parents." Id. at 459, 108 S.Ct. 2481. Second, the Court saw no "reason to suppose that this user fee will 'promot[e] the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime.' " Id. (quoting Plyler, 457 U.S. at 230, 102 S.Ct. 2382). Finally, the Court made reference to the fact that the North Dakota statute made provision for students who could not afford the school bus user fee, giving local school boards authority to "waive any fee if any pupil or his parent or guardian shall be unable to pay such fees. No pupil's rights or privileges, including the receipt of grades or diplomas, may be denied or abridged for nonpayment of fees." Id. at 459-60, 108 S.Ct. 2481 (citing N.D. Cent.Code

§ 15-43-11.2 (1981)). After describing these distinctions, the Court concluded that "[t]he case before us does not resemble Plyler." Id. at 460, 108 S.Ct. 2481. Turning to the rational basis test, the Court found that the school bus fee's imposition of a greater burden on the poor did not deny equal protection of the law. Id. at 462, 108 S.Ct. 2481.

The Third Circuit has had occasion to comment on these Supreme Court precedents. In Philadelphia Police & Fire Ass'n v. Philadelphia, 874 F.2d 156 (3d Cir.1989), a class of plaintiffs alleged that the City of Philadelphia had violated the equal protection clause by responding to cuts in state funding for services for the mentally retarded by reducing the level of certain "soft services" (case management, family support, and early intervention) directed to retarded citizens living at home. The Third Circuit concluded that the principles announced in Plyler were not applicable to the issue of funding for the mentally retarded. Id. at 165. [FN16]

> FN16 As the above indicates, the plaintiffs in Philadelphia Police & FireAss'n attempted to stretch the applicability of Plyler to a distinct (and perhaps somewhat distant) context--the allocation of funding for services for the mentally retarded. Determining that Plyler 's heightened scrutiny standard was not the proper standard of scrutiny to apply to legislative choices about funding for services for the mentally retarded, the Philadelphia Police & Fire Ass'n court characterized Plyler as applying to "the unique circumstances of a burden on education coupled with the disadvantaging of children of aliens." The Philadelphia Police & Fire Ass'n court did not, of course, have occasion to determine the precise extent to which Plyler --interpreted by Papasan and Kadrmas --remains applicable in the education context.

### 3. Choice of Scrutiny Standard

Having canvassed the jurisprudence of standards of scrutiny for equal protection clause claims, both in general and in particular within the context of education, I turn to the claims made in this case. Plaintiffs do not contend that this court should subject 24 P.S.A. § 13-1306.2(a) to strict scrutiny. [FN17] Plaintiffs argue for the heightened scrutiny standard set forth in Plyler; defendants argue for the rational basis test standard. If 24 P.S.A. § 13-1306.2(a) operates in a manner sufficiently similar to the statutory scheme at issue in Plyler, then heightened scrutiny is appropriate; if it does not, rational basis applies. In order to determine the degree of similarity of the impact of 24 P.S.A. § 13-1306.2(a) and the impact of the Texas statutory scheme, I return to the elements central to the Plyler Court's invocation of heightened scrutiny in the context of a deprivation of public school instruction: a denial of education; plaintiffs' lack of power over their disabling status; the importance of the right in maintaining basic institutions; and the consequences to individuals flowing from deprivation of the right.

> FN17. From a doctrinal perspective, such an argument would not be untenable. As Papasan noted, the Court "has not yet definitively settled the question[ ] whether a minimally adequate education is a fundamental right." 478 U.S. at 285, 106 S.Ct. 2932. However, such an argument would not, in my view, be persuasive on the facts of this case. As I note infra at section III.B.3.e. of this opinion, "I find that the deprivation worked by § 13-1306.2(a)--loss of education for up to five years, commencing no earlier than the fourteenth birthday--is not substantial enough to constitute a Plyler-like denial of education." A fortiori, strict scrutiny is not the proper standard in this case.

a. Does 24 P.S.A. § 13-1306.2(a) effect a denial of education?

24 P.S.A. § 13-1306.2(a) appears to have the effect of permitting local boards of education to (1) limit to five hours per week (the accepted instructional ration of homebound students) the education provided to persons under the age of seventeen who are incarcerated, pursuant to conviction, in county correctional institutions, and (2) provide no education to those school- aged persons between seventeen and twenty incarcerated, pursuant to conviction, in county correctional institutions.[FN18] In other institutions--state correctional institutions or juvenile facilities--persons of school age who have not reached their twenty-first birthday are generally entitled to receive 27.5 hours of instruction per week.

FN18. See text accompanying notes 8-9, supra.

Persons who have passed their fourteenth birthday but have not reached their seventeenth birthday and who, pursuant to conviction, are incarcerated in county correctional facilities, receive as little as 18% of the public school instruction provided to their counterparts incarcerated in other institutions, while their older peers--persons aged seventeen to twenty incarcerated in county correctional facilities--receive none. It may be that such a deprivation threatens the "creation of an underclass of future citizens and residents," Plyler, 457 U.S. at 236, 239, 102 S.Ct. 2382 (Powell, J., concurring), an underclass that would impose "significant social costs," id. at 221, 102 S.Ct. 2382.[FN19] In Rodriguez, Papasan, and Kadrmas, the Court found that school funding systems or bus fees did not threaten the creation of an underclass. See, e.g., Kadrmas, 487 U.S. at 459, 108 S.Ct. 2481. Notably, none

of the statutory systems at issue in those three cases reduced the hours of instruction of any class of citizens by so much as a single hour. In contrast, 24 P.S.A. § 13-1306.2(a)--like the Texas statute at issue in Plyler --deprives young persons of the great bulk of their state-created educational entitlement.

> FN19. Nothing in either Papasan or Kadrmas undercuts Plyler 's concerns, since in both cases plaintiffs continued to receive significant public educational benefits. The Papasan plaintiffs alleged educational funding disparities--not deprivation of education--and the Court specifically found that they did not allege any facts suggesting a denial of basic educational services, 478 U.S. at 286, 106 S.Ct. 2932. Similarly, Sarina Kadrmas continued to attend, during the entire course of her litigation, the precise school that she claimed the North Dakota school bus fee statute prevented her from attending, 487 U.S. at 456, 108 S.Ct. 2481.

The record in this case establishes that a deprivation of this magnitude--an 82% diminution in hours of education for a person who could be as young as fourteen[FN20]--is likely to have serious effects on education and literacy. The majority of incarcerated individuals have a history of poor educational achievement, school failure, and low skill proficiency, a fact reflected in the disproportionate number of persons with poor literacy skills found in the criminal justice system. See 11/25/97 Tr. at 5-6 (expert testimony of Dr. Peter Leone); see also Addendum to Expert Rep. at 1; Attachment to Pl.Ex. 5 (Center on Crime, Communities and Culture, Research Brief, "Education as Crime Prevention" ["Research Br."] ). Roughly 40% of young persons in detention have a learning disability. Addendum to Expert Rep. at 1; Research Br. at 3. Cf. 11/25/97 Tr. at 6-7, 83-88 (county, state, and juvenile detention centers have same percentage of learning disabled inmates). Cf.

also Stipulated Facts ¶ 59. Uncontested evidence indicates that five hours of education per week is not sufficient to learn basic skills, let alone to pass a GED examination. 11/25/97 Tr. at 14-15 (expert testimony of Dr. Peter Leone); see also Expert Rep. at 12-13. Indeed, expert testimony suggests-- without contradiction--that an educational program offering only five hours of instruction per week provides little benefit. Id. at 16. It appears that, upon their release from custody, many individuals limited to five hours of instruction per week during their stay in a county correctional institution will find themselves illiterate and unemployable. 11/25/97 Tr. at 9-11; Expert Rep. at 13-15.

> FN20. A juvenile court may transfer a proceeding against a child who is at least fourteen years old to criminal court if the juvenile court determines that the public interest is served by the transfer. See generally 42 P.S.A. § 6355; 42 P.S.A. § 9762(3); 42 P.S.A. § 9762(1); 42 P.S.A. § 9762(2) (all discussed supra in text).

Nevertheless, on the preliminary injunction record before me, I cannot conclude that 24 P.S.A. § 13-1306.2(a)'s radical abridgement of classroom hours is closer kin to Plyler 's total denial of instruction than to the school-funding inequalities addressed in Rodriguez and Papasan or the denial of free school-bus transport addressed in Kadrmas. Because Pennsylvania makes education compulsory for persons who have not yet reachedtheir sixteenth birthday, 24 P.S.A. § 13-1326, the plaintiffs--all of whom are between the ages of fourteen and twenty--are likely to have had the opportunity to acquire many of the skills that the plaintiff children in Texas had not had an opportunity to acquire. Contra Nancy M. v. Scanlon, 666 F.Supp. 723 (E.D.Pa.1987) (foster children of all

ages).[FN21] Considered over the course of the fifteen years during which a Pennsylvania resident is entitled to public education, the potential for a substantial curtailment of education near the end of that entitlement period does not seem to me to come close enough to Plyler to warrant the application of heightened scrutiny.[FN22]

FN21. Nancy M. involved a challenge by a class of non-resident dependent foster children to the constitutionality of a section of the Pennsylvania Public School Code that permitted "a Pennsylvania school district to refuse to accommodate non-resident, dependent children who live in foster homes within the district"; the districts were otherwise required to accommodate all children within their borders. Id. at 724. Noting that the statute deprived foster children of the general entitlement to education, the court, citing Plyler, found heightened scrutiny appropriate and determined that the statute would have to be "substantially related to the achievement of important governmental objectives" to survive. Id. at 727 (citation omitted). The court then struck down the statute, declaring the defendants' announced objectives not significantly important and finding that the means by which defendants sought to effect those objectives were not substantially related to those objectives.

FN22. Depending on how one weighs the relative effects of educational deprivations, one of two scenarios would describe the largest possible loss of education: a person incarcerated in a county correctional institution on her fourteenth birthday, pursuant to a sentence one day shy of five years, or a person incarcerated in a county correctional institution on his sixteenth birthday, pursuant to the same sentence. The former would be entitled to five hours of education per week from her fourteenth birthday to her seventeenth birthday, and then entitled to no education from her seventeenth birthday to her release (one day shy of her nineteenth birthday); if she still wished to pursue education upon her release, the nineteen-year old could avail herself of the two years and one day remaining in her entitlement

period, though unrebutted evidence suggests that a significant break in education during confinement makes it considerably less likely that she would continue her education upon release. See 11/25/97 Tr. at 11; Pl.Ex. # 5 at 4 (expert report of Dr. Peter Leone). The person sentenced to an almost-five year incarceration beginning on his sixteenth birthday would be entitled to five hours of education for his first year in prison, and then no education for his remaining four years; upon release, he would no longer be entitled to education since, as indicated above, Pennsylvania (like most states) does not provide public education to persons who have reached their twenty-first birthday. While Secretary Hickok correctly asserts that "those youth in county jails 17 or older lose only their entitlement to education during their time of incarceration," Commonwealth Def. Post-trial Br. at 12, the second example reveals that some school-aged persons will remain incarcerated past their twenty-first birthday.

b. Power over Disabling Status

At first glance, the plaintiffs in this case appear to be quite unlike the Plyler plaintiffs: Brian B. and his class cohorts are not children innocently led to violate our laws by decision-making parents; they are young people incarcerated for the commission of intentional and serious crimes. As Secretary Hickok correctly notes, they "certainly could have avoided their disabling status by not committing the serious crimes for which they were found guilty." Commonwealth Def. Post-trial Br. at 13. That fact does not end the inquiry, however. While plaintiffs could have avoided their disabling status by forbearing from the commission of crime, the relevant comparison is not between the criminal and the innocent but between inmates of county correctional institutions and other inmates.

Pennsylvania law does not undertake to impose strict limits on judicial discretion in sentencing. 42 P.S.A. § 9721 provides "that the sentence imposed should call for confinement that is consistent with the protection of the public, the gravity of the offense as it relates to the impact on the life of the victim and on the community, and the rehabilitative needs of the defendant." In imposing sentence, the court "shall also consider any guidelines for sentencing" set forth in the Commonwealth's consolidated statutes. Id. The court may "impose[ ] a sentence outside the sentencing guidelines," so long as it "provide[s] a contemporaneous written statement of the reason or reasons" for departing. Id.

For persons within either of two classes of convicted inmates, a decision to commit a particular crime may be said to involve a measure of control over the sort of institution in which the prisoner finds himself confined. State correctional institutions house both convicted offenders sentenced to five years or more and convicted offenders sentenced to two to five years and then discretionarily assigned to state institutions. Of those sentenced to five years or more, some were convicted of a limited set of crimes that carry mandatory minimum sentences of five years or more. See 42 P.S.A. § 9712 (certain offenses committed with firearms), 42 P.S.A. § 9713 (certain offenses committed on public transportation), 42 P.S.A. § 9714 (repeat offenders), 42 P.S.A. § 9715 (homicide), 42 P.S.A. § 9717 (certain offenses against elderly persons), 42 P.S.A. § 9718 (certain offenses against infant persons), 42 P.S.A. § 9719 (certain offenses committed while impersonating a law enforcement officer). Because a sentencing judge must commit persons sentenced to five or more years to a state institution, see 42

P.S.A. § 9762, persons who commit those mandatory-minimum crimes have, at least conceptually, chosen their place of incarceration.

The same may be said of persons who have committed crimes which are punishable by mandatory maximum sentences of less than two years. Because a person sentenced to a maximum term of less than two years must serve his sentence in a county correctional institution within the jurisdiction of the court, 42 P.S.A. § 9762(3), a person committing such a crime could be regarded as knowing, or at least having reason to know, where she will serve her time-- assuming she undertakes an act that can give rise to a charge of only one such crime.

Many young offenders, however, do not fall into either of those categories. For them--young persons whose crimes are not of such magnitude as to trigger a statutory mandatory minimum sentence of at least five years but are more serious than the offenses for which incarceration is capped by a statutory maximum of less than two years--it is a judge, not the convicted offender himself, who chooses the sort of facility in which the offender will be incarcerated. A sentencing judge has general discretion over the length of sentence. See 42 P.S.A. § 9721. Because a sentence of less than two years leads to incarceration in a county correctional institution and a sentence of five or more years leads to incarceration in a state correctional institution, see 42 P.S.A. § 9762(1), (3), a judge imposing either sentence determines the location of the individual's incarceration. A judge sentencing a defendant to a term of two years or more but less than five years exercises a second level of discretion, deciding--independent of the length of sentence--to which sort of institution the

defendant should be sent. See 42 P.S.A.§ 9762(2); see also Commonwealth v. Stalnaker, 376 Pa.Super. 181, 545 A.2d 886, 888 (1988) (decision as to facility "within the sound discretion of the trial judge").

In sum, two subsets of persons incarcerated subject to conviction-- persons committing crimes with mandatory minimum sentences of at least five years, and persons committing crimes with maximum sentences of less than two years--may be said to have, in a certain sense, chosen their place of incarceration. The rest cannot be said to have chosen their place of incarceration. Those convicted inmates serving their time in county correctional institutions subject to sentences imposed for the commission of crimes punishable by at least two years have not at any time exercised power over the disabling status relevant to the educational deprivation at issue in this case: placement in a county correctional institution. Cf. Nancy M., 666 F.Supp. at 723 (foster children's right to education subject to discretionary placement decision of state agency).

c. Structural Significance of the Right

Writ large, the right at issue here--access to education--is the same as that in Plyler. Indeed, Secretary Hickok does not claim that "the importance of education in maintaining our basic institutions," 457 U.S. at 221, 102 S.Ct. 2382, has abated since Plyler. However, the structural significance of access to education may differ depending on the age group of the class denied the access. The Texas statutory scheme at issue in Plyler denied access to education for children of all ages--not just those fourteen and over, as § 13-1306.2(a) does. Where Justice Brennan wrote persuasively in Plyler

of "the importance of education" in providing children with the skills necessary to the prudent exercise of fundamental rights such as voting and speech, the argument has somewhat less force when applied to persons between fourteen and twenty, who have already had many years of school.

d. The Cost to Individuals of Deprivation of the Right

That persons between fourteen and twenty have already had the opportunity to acquire the skills necessary to exercise rights such as voting and speech does not mean that deprivation of further educational opportunities is not seriously harmful. Indeed, on the record before me I cannot say that the cost of deprivation of education is different in kind from the cost of the deprivation of education on the plaintiff class in Plyler --namely, that such deprivation forecloses "the means by which [the plaintiff class] might raise the level of esteem in which it is held by the majority." 457 U.S. at 222, 102 S.Ct. 2382. The Plyler Court noted that an individual deprived of basic education would be handicapped "each and every day of his life," and enumerated the costs of that handicap in the stark terms of an "inestimable toll ... on the social, economic, intellectual, and psychological well-being of the individual." Id.

The record in this case illustrates, unhappily, the continuing vitality of the findings which underlay the Court's decision in Plyler a dozen years ago. As testimony at the preliminary injunction hearing revealed, persons who enter county correctional institutions deficient in basic skills and are then deprived of education while incarcerated are unlikely to become literate upon release.

Pl.Ex. 5 at 13. And those who do not gain a high school diploma are anywhere from three to five times as likely to suffer poverty as their graduating peers. Id. at 14; see also Profile of the Working Poor, U.S. Dept. of Labor, Bureau of Labor Statistics (1997) (rate of poverty of workers without high school diploma three times higher than workers with high school diploma); The Forgotten Half, Wm. T. Grant Foundation, Comm'n on Work, Family, and Citizenship (1988) (young persons with basic reading and mathematics skills in bottom fifth five times more likely to suffer poverty). Moreover, they are more than five times as likely to be forced to rely on public assistance, and more than three times as likely to be unemployed. Pl.Ex. 5 at 14; see The Forgotten Half, supra; see also generally 11/25/97 Tr. at 8-12.

e. Appropriate Standard

In weighing the four factors analyzed above, I conclude that a portion of the plaintiff class, vis-a-vis its similarly-situated peers in other correctional institutions, has no control over the disabling status of assignment to a county correctional institution. Moreover, I conclude that, as a general matter, deprivation of education has a severely detrimental impact on the lives of the individuals deprived. Nevertheless, I also conclude that educating persons between fourteen and twenty is not as important in maintaining the basic institutions of our society as educating younger persons. Finally, I find that the deprivation worked by § 13-1306.2(a)-- loss of education for up to five years, commencing no earlier than the fourteenth birthday--is not substantial enough to constitute a Plyler-like denial of education. I therefore conclude that the rational basis test is the more appropriate standard for

analyzing the impact of 24 P.S.A. § 13- 1306.2(a) on convicted inmates of county correctional institutions.

4. Analysis

In order to obtain a preliminary injunction, plaintiffs must demonstrate a likelihood that they will prove at trial that § 13-1306.2(a) is not rationally related to a legitimate government interest. That is a tall mountain to climb, and plaintiffs cannot quite plant their flag.

Secretary Hickok claims that providing convicted school-aged inmates of county correctional institutions with educational services equal to their peers incarcerated in state correctional institutions would prove "more difficult, more expensive and more burdensome than providing these services in a state correctional institution."[FN23] Commonwealth Def. Post-trial Br. at 15. Secretary Hickok traces that higher difficulty and expense to several differences between state and county correctional institutions: 1) space limitations in county correctional institutions; 2) higher per-student cost in county correctional institutions; 3) security concerns that would arise in state correctional institutions if education were discontinued; and 4) the greater need for education in state correctional institutions, independent of security concerns.

FN23. Secretary Hickok argues that convicted school-aged persons incarcerated in juvenile facilities are not similarly situated to convicted school-aged persons housed in county correctional institutions because the juvenile system and the criminal justice system have different goals. Education of school-aged youth, he says, better comports with the goals of juvenile adjudication--"to seek treatment, reformation and

rehabilitation"--than it does with the goals of the criminal justice system--"to punish individuals who fail to obey the law." Commonwealth Def. Post-trial Br. at 14. I have no reason to doubt that the Commonwealth has an important interest in (1) attempting to treat those offenders whom it believes require treatment and (2) punishing those offenders whom it believes require punishment. Withholding education from those persons that the government--through judicial analysis of the factors set out in 42 P.S.A. § 6355(a)(4), see supra note 7--has determined need punishment rather than treatment can be said to relate not irrationally (if not persuasively) to that legitimate government interest. The ensuing analysis focuses on the more difficult question whether there is a rational, and hence constitutionally sufficient, basis for the disparity between the education offered to convicted offenders incarcerated in county and state correctional institutions.

a. Space Limitations in County Correctional Institutions

Secretary Hickok claims that the limited space available within county correctional facilities for educational programming justifies providing less (or no) education to convicted school-aged persons incarcerated in those institutions.[FN24] The limited space presents a problem not because there is no space in which educational services may be provided, he argues, but because county correctional institutions could be forced "either to pre-empt other programs ... [or] make costly renovations to the jails to add rooms...." Commonwealth Def. Post-trial Br. at 16-17.[FN25]

FN24. At the hearing held in this matter on November 24-25, 1997, Maynard Strock, Prison Inspector for the Pennsylvania Department of Corrections, testified that Union County,

Montour County, and Mifflin County correctional institutions have no areas for conducting any kind of programming. 11/25/97 Tr. at 117, 120, 121. Other counties have very limited facilities for all programs: Juniata, Huntingdon, Beaver, and Schuylkill (one small room); Indiana and Vanango (library); Adams County (gymnasium); Wayne (small room designated as minimum security); and Mercer (area outside the cell blocks). 11/25/97 Tr. at 118-22.

FN25. Other programs offered by county correctional institutions may include drug and alcohol counseling, mental health counseling, parole review, staff training, inmate disciplinary hearings, and indoor recreation. The same rooms are occasionally used for prisoner visitation. 11/25/97 Tr. at 115-16.

On average, state correctional institutions have more space dedicated to educational programming than do county correctional facilities. Pl.Ex. 9. That is not always so; several county correctional institutions have more extensive educational facilities than at least one of the state correctional institutions, 11/25/97 Tr. at 115. Of course, the fact that most state correctional institutions have more space than most county correctional institutions says nothing about whether county correctional institutions have enough space. Secretary Hickok points to thirteen of the seventy-three county correctional institutions, identifying the thirteen as institutions where space constraints might make the provision of basic education more difficult than it is at state correctional institutions.[FN26] 11/25/97 Tr. at 115-22. He argues that requiring the provision of basic educational services in county correctional institutions would force those institutions to curtail other programming.[FN27]

FN26. The three county correctional institutions located in school districts that are defendants in this case are not among the thirteen county correctional institutions identified as having insufficient space for educational programming.

FN27. In support of this argument, Secretary Hickok has shown that eight of the thirteen institutions have one or more higher security rooms available for programming. Id. Three do not have a programming area. Id. at 117, 120-21. One has a minimum security room available for programming; another has an open area outside a cell block for programming. Id. at 121-22.

Plaintiffs offer several rebuttals. First, they observe that Secretary Hickok has identified only thirteen of the Commonwealth's seventy-three county correctional institutions where space constraints would be a problem; those thirteen are among the smallest of the Commonwealth's county correctional institutions. Second, they note that, even in those thirteen institutions, defendants are now bound under the terms of the Interim Agreement to provide both basic educational services to pre-trial detainees (held in the same general correctional institution population as convicted offenders) and special educational services to pre-trial detainees and convicted offenders.[FN28] Finally, plaintiffs argue that even if some fraction of county correctional institutions do not have sufficient resources for the provision of basic educational services at present, they could adapt to accommodate such provision, just as Commonwealth correctional institutions have adapted in the past to meet the demands of larger populations and newly articulated legal requirements.

FN28. See Pennsylvania Department of Education, Basic Education Circular-- Education Services for Students Incarcerated in Local Correction Institutions § II (Jan. 15, 1998).

Those rebuttals narrow Secretary Hickok's space argument down to its essential core: a contention that, of the fraction of county correctional institutions identified as presenting possible space problems, one or more of those institutions could find itself housing convicted offenders who, but for § 13-1306.2(a), would be entitled to 27.5 hours of basic education per week. In such a situation, a correctional institution pressed for space but directed by court order to disregard § 13-1306.2(a) might have to displace other programming in order to make room for a class that provides basic education. That is a thin reed to support a statute which entails so substantial a deprivation. But the rational basis test sets a low threshold, one that permits statutes to pass muster even if they are based on no more than "rational speculation unsupported by evidence or empirical data." FCC v. Beach Communications, 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). Secretary Hickok's justification surmounts that low obstacle.[FN29]

> FN29. The Secretary's rationale would have difficulty surviving heightened scrutiny. Though the allocation of county correctional institution programming--i.e., establishing priorities among education, substance abuse counseling, mental health counseling, parole review, staff training, inmate disciplinary hearings, and inmates' indoor recreation--appears to be an important government interest, I cannot say that § 13-1306.2(a) is 'substantially' related to that interest. The statute says nothing about allocating county correctional institution resources, and the defendants have identified only a small percentage of county correctional institutions where it is foreseeable that providing inmates with the full complement of education provided to their state correctional institution peers could contribute to difficulties with facilities management. Moreover, § 13- 1306.2(a) does not permit local school districts (or the Commonwealth itself)

to withhold education from youthful offenders housed in those state correctional institutions that suffer from space shortages. The heightened scrutiny test does not require a statute to take the least restrictive possible path to its goal, but neither does it sanction indirection.

### b. Higher Per-Student Cost in County Correctional Institutions

Secretary Hickok argues that "[t]he state legislature could reasonably conclude that, given the considerably larger number of school age youth in the prison state system than any county jail ... education can be achieved at a greater cost effectiveness in state correctional institutions than in county jails." Commonwealth Def. Post-trial Br. at 17-18. The Secretary's argument may be understood as an assertion that the legislature may have intended to reduce average per-pupil expenditures by not providing education to correctional facilities that house few convicted offenders, where per-pupil costs might well be higher. Secretary Hickok has not produced proof showing that the curtailment of education for school-aged convicted offenders incarcerated in county correctional institutions has actually resulted in lower per-pupil expenditures. And it seems to be the case that several county correctional institutions house more school-aged convicted offenders than do a number of state correctional institutions [FN30]--suggesting that in the several instances in which § 13-1306.2(a) channels educational programs to smaller school-aged populations in state correctional institutions rather than to larger school-aged populations in countycorrectional institutions, the statute may be seen, perversely, as tending to raise per-pupil costs. A legislature interested in reducing per-pupil educational expenditures might do better to eliminate education in correctional

institutions that house less than a designated number of students, whether those institutions are state or county correctional institutions.

> FN30. The Philadelphia House of Corrections apparently houses more incarcerated persons of school age than any state correctional institution in the Commonwealth. The Delaware County Prison and York County Prison each appear to house more incarcerated persons of school age than several of the state correctional institutions. Compare Pl.Ex. 7 (analysis of sentenced county jail prisoners under age 21–1994 admissions) with Pl.Ex. 8 (adult institutions school eligible count by age as of 8/31/97).
> A precise comparison of state and county inmate populations is not possible on the record before the court, because the parties have not been able to document the number of school-aged persons in state correctional institutions in 1994 or the number of school-aged persons in county correctional institutions in 1997. However, the fact that county correctional institution data derive from pre-1995 prisoner counts and state correctional institution data derive from post-1995 prisoner counts makes it more likely that plaintiffs would be able to show at trial that there is not a substantial relationship between the deprivation of basic education in county correctional institutions and the putatively important government interest of lowering per-pupil educational costs. That is so because Act 33, passed and signed into law in 1995, has evidently substantially broadened the catalogue of crimes for which a person under the age of twenty-one could be tried as an adult, including–for the first time–many crimes that customarily result in sentences of less than two years. See 11/24/97 Tr. at 49. Thus it would appear that the percentage of county correctional facility populations under age twenty-one has rapidly expanded.

Under the rational basis test, however, the Secretary need not prove that § 13-1306.2(a) is wise legislation. In rational basis scrutiny, a concern for the preservation of resources generally suffices to justify a classification. See, e.g., Heller

v. Doe, 509 U.S. 312, 321, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993). That is so because "reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955).[FN31] Under this standard, § 13-1306.2(a) passes muster. It is not for this court to consider whether the short-term cost-cutting that the legislature presumably seeks will lead to considerably greater long-term costs--in the form of increased recidivism, increased crime and law enforcement costs, and public assistance to persons ill-equipped to care for themselves, matters with respect to which plaintiffs presented persuasive and unrebutted expert testimony.[FN32]

FN31. Plaintiffs argue further that county correctional institutions' ability to transfer inmates to other institutions pursuant to 61 P.S.A. § 72 vitiates the rational relationship between § 13-1306.2(a) and saving money. It does not. That it may be possible for the Commonwealth to save money by transferring inmates among institutions in order to aggregate students into cost-effective classes, rather than foreclosing education to inmates in an entire class of institutions, does not mean that the equal protection clause requires it. "[C]ourts are compelled under rational basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends." Heller v. Doe, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993).

FN32. Were heightened scrutiny the appropriate standard, matters would stand rather differently; under that analysis, "a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources." Plyler, 457 U.S. at 227, 102 S.Ct. 2382 (citing Graham v. Richardson, 403 U.S. 365, 374-75, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971)). The question under heightened scrutiny would be whether the relationship between cost savings and the educational deprivation effected by 24 P.S.A. § 13-

1306.2(a) on county correctional institution inmates but not state correctional institution inmates is 'substantial'. On the facts before me, I think it likely that plaintiffs would be able to prove that 24 P.S.A. § 13-1306.2(a) is not substantially related to the governmental interest in saving money.

c. Security Concerns in State Correctional Institutions

Secretary Hickok also argues that the provision of education to state correctional institution inmates is responsive to security concerns. In support of this rationale, Secretary Hickok points out that inmates in state correctional institutions have received educational services in the past. To discontinue such services now, he argues, would have a deleterious effect on the orderly running of those institutions.

Without question, correctional institution security is a legitimate government interest. See Turner v. Safley, 482 U.S. 78, 84-85, 107 S.Ct. 2254, 96 L.Ed.2d [illegible] (1987). Section 13-1306.2(a) does not, however, appear to relate rationally to that important interest. Even if it is true that discontinuing educational services in state correctional institutions would erode security there--and this court has no reason to suppose it is not true--Secretary Hickok need not choose such a path in order to cure any putatively illegal inequality created by § 13-1306.2(a). Plaintiffs do not seek dismantlement of state correctional institution educational programs. Section 13-1306.2(a) thus cannot be said to be rationally related to the legitimate government interest of maintaining correctional institution security.

d. Comparatively Greater Need for Education in State Correctional Institutions

Finally, Secretary Hickok asserts that there is a greater educational need for education for school-aged convicted offenders housed in state correctional institutions than for school-aged convicted offenders housed in county correctional institutions. According to the Secretary, the legislature could have determined that "the longer term and more stable youth population found in the state correctional system would benefit more from educational services than a much more transient population found in county jails." Commonwealth Def. Post-trial Br. at 18-19. The Secretary points out that an offender's term in a county correctional institution could be less than a school year, a situation that could not occur for a school-aged youth incarcerated in a state correctional institution.

Plaintiffs argue that this contention is undermined by the fact that pretrial detainees--who often spend even less time in county correctional institutions--are entitled to basic education. See Interim Agreement ¶ 5-6. Similarly, convicted offenders entitled to special education also receive education, regardless of length of sentence or whether the correctional facility is state or county. Id. ¶ 1-4. It would be odd, plaintiffs reason, to presume that of all groups of school-aged persons incarcerated in adult facilities--pretrial detainees in state institutions, pretrial detainees in county institutions, convicted offenders in state institutions, convicted offenders in county institutions who are entitled to special education, and convicted offenders in county institutions who are not entitled to special education--the legislature believed that the last, and only the last, would receive little benefit from education.[FN33]

FN33. Insofar as the Secretary's argument may be understood to be based on a concern for a classroom uninterrupted by

> "transient" inmates, it appears to be without substance. Correctional education does not conform to the school calendars one is accustomed to outside prison walls. Young persons are sentenced to incarceration throughout the year, and the system of criminal justice does not deposit the newly convicted in batches at the beginning of academic semesters. Classroom teachers must adapt quickly, integrating newcomers into the classroom community as surely as they bid goodbye to the newly freed. It must be a rare inmate who finds himself incarcerated on the first day of the school year and freed on the last, and perhaps as rare a correctional institution classroom that sees no change in its student population from September to June.

Pedagogical matters, such as promoting educational efficiency and efficacy, no doubt involve legitimate government interests. Plaintiffs have shown, however, that the disparity of treatment fostered by § 13-1306.2(a) may be only remotely connected to those legitimate interests. Perhaps this is why Secretary Hickok's colleague--James Keeley, acting chief of the Bureau of Correction Education of the Pennsylvania Department of Education--testified that there appears to be "no reason why the school-aged population in the county prison should be treated differently than school-aged youth in the [juvenile] system and adult state correctional system." 11/24/97 Stipulated Facts ¶ 69. See also 11/25/97 Tr. at 17-18 (expert testimony by Dr. Peter Leone).

Notwithstanding Keeley's testimony, the Secretary asserts a rational basis in a somewhat different form by asserting that a "school age youth incarcerated for a longer term in a state prison has a greater need for education because he is much less likely to be able to return to his former school district following incarceration." Commonwealth Def. Post-trial Br. at 19. Secretary Hickok is correct that a youth

incarcerated at a county correctional institution is more likely to be eligible for education upon his release than an inmate of a state correctional institution, since convicted offenders in county facilities serve shorter sentences, on average, than those in state facilities, making it more probable that those in county facilities will be released before they are too old to receive free public education. It does not necessarily follow, however, that young persons incarcerated in county correctional institutions are more likely than their state-incarcerated peers actually to return to school following incarceration. Plaintiffs have provided credible--and unrebutted--expert testimony that a significant break in education during confinement makes it unlikely that a convicted offender will resume his education when released. 11/25/97 Tr. at 11; Pl.Ex. # 5 at 4 (expert report of Dr. Peter Leone).

Nevertheless, Keeley's statement and plaintiffs' arguments are not enough to show a probability that the statute will fail the rational basis test. Though I believe that most informed observers would not find Secretary Hickok's link between the educational disparity and the interest in educational efficiency to be persuasive, the rational basis inquiry delves neither into the actual rationality of the link between disparity and interest, FCC v. Beach Communications Inc., 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993), nor into the legislature's actual belief in the rationality of the link between disparity and interest, Nordlinger v. Hahn, 505 U.S. 1, 15, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992); it asks only whether "there is any reasonably conceivable state of facts that could provide a rational basis for the classification." Beach Communications, 508 U.S. at 313, 113 S.Ct. 2096. The Secretary has articulated a basis for the classification that,

within the undemanding analytical framework to which Beach Communications directs us, could be thought to justify the asserted link between the disparity in education and the promotion of educational efficiency.

e. Finding

By accepting propositions attributed (by Secretary Hickok) to the legislature as ones that they conceivably entertained--though there is no evidence that the legislature in fact acted on one or more of these grounds--I am constrained to conclude that such propositions must, under governing precedent, be described as "rational", if only by the narrowest of margins. I therefore do not find it likely that, at trial, plaintiffs will be able to prove that § 13-1306.2(a) violates the equal protection rights of convicted school-aged inmates of county correctional institutions.[FN34]

FN34. It is at least conceivable that § 13-1306.2(a) would be open to an as-applied challenge by virtue of its interaction with Pennsylvania's custodial assignment system, which controls the entitlement to schooling vel non of those in custody. As indicated above, except for those offenses which carry a legislatively mandated minimum or maximum term of incarceration, a state court judge imposing sentence in conformity with Pennsylvania law has general discretion over the length of sentence. A sentence of less than two years automatically leads to incarceration in a county correctional institution; a sentence of five or more years automatically leads to incarceration in a state correctional institution. A judge imposing a sentence that falls into either of those categories thereby determines the location of the individual's incarceration. A judge sentencing a defendant to a term of more than two years but less than five years exercises a second level of discretion. Independent of the length of sentence, she must decide to which sort of institution the defendant should be sent. Pennsylvania judges have been

advised that it is proper to take education into account when they make the second-level custodial decision. See Commonwealth v. Stalnaker, 376 Pa.Super. 181, 545 A.2d 886, 890 (1988) (reviewing sentencing court's custodial decision) ("The court's decision to sentence appellant to a state institution was a carefully weighed decision in which it considered, among other permissible factors, the fact that the state system provided programs that would foster appellant's educational and vocational needs. We find that this was a proper consideration of appellant's rehabilitative needs, especially in light of the fact that appellant did not have a high school diploma or any significant vocational training."). It is unclear whether Pennsylvania judges making the first-level sentencing decision consider how the sentence will affect educational entitlements. In any event, the defendants in this case do not determine the assignment process, and therefore would, presumably, not be the proper defendants for such a challenge.

### C. Remaining Preliminary Injunction Factors

Because plaintiffs have not shown that they are likely to succeed on the merits, there is no need to analyze the remaining factors that a plaintiff must show in order to secure a preliminary injunction.

## IV. Conclusion

For the foregoing reasons, I have concluded that plaintiffs' constitutional challenge to 24 P.S.A. § 13-1306.2(a) is not likely to prove successful at a full trial on the merits.[FN35] To conclude that a statute is probably not unconstitutional is not to conclude that a statute is wise, or probably so. The statute challenged in the present case is a state statute. Our constitutional system, as Justice Brandeis so tellingly instructed us, encourages the states to experiment. Not all experiments are sensible.

FN35. It is not, indeed, at all clear that at a full trial on the merits the parties would develop a record more complete than the substantial record established at the preliminary injunction hearing, as supplemented by the parties' extensive additional submissions.

The record contains considerable evidence delineating the "inestimable toll ... on the social, economic, intellectual, and psychological well-being" of individuals caused by a deprivation of education. Plyler, 457 U.S. at 222, 102 S.Ct. 2382. Beyond the toll on the individual plaintiffs, unrebutted testimony suggests that the statute undermines public safety and the public interest. Expert testimony reveals that the cost of inmate education is approximately one-fourth of the costs of rearrest and reincarceration. 11/25/97 Tr. at 11-12 (expert testimony of Dr. Peter Leone). As reported by Dr. Leone, plaintiffs' expert witness on prison education, [FN36] studies commissioned by several states have shown that rates of rearrest and reincarceration are linked to levels of prisoner literacy and prisoner education. Id. at 12. That may be why Dr. Leone concluded that the single most cost-effective way of lowering the crime rate "is to provide educational programs to inmates while they're locked up." Id. Perhaps Secretary Hickok's own colleague--Director of the Bureau of Correction Education Bill Mader--put it most succinctly when he said "if we don't want to see them come back, we have to do something to help them while they are there." Stipulated Facts ¶ 54. Because "well run educational programs have incredible stabilizing effect[s] on institutional [i.e., inmate] populations," prison education increases safety within prison walls as well--for both inmates and the public servants entrusted with their care. 11/25/97 Tr. at 12.

FN36. Dr. Leone is Professor of Special Education at the University of Maryland and Director of the Center for the Study of Troubling Behavior. 11/24/97 Tr. at 67-69.

Every member of the plaintiff class is serving a sentence of less than five years. See 42 P.S.A. § 9762. The average sentence of class members is less than a year. Stipulated Facts ¶ 60. At the end of those short sentences, the plaintiffs will rejoin the community that has punished them for their misdeeds. When members of the plaintiff class left that community to begin their punishment, they were disproportionately likely to have received inadequate education, been illiterate, and to have suffered from emotional disturbances. 11/25/97 Tr. at 5-7, 83-88 (expert testimony of Dr. Peter Leone); Pl.Ex. 5 at 5; Addendum to Pl.Ex. 5 at 1; Addendum to Expert Rep. at 1; Attachment to Pl.Ex. 5 (Center on Crime, Communities and Culture, Research Brief, "Education as Crime Prevention" at 2-3); Stipulated Facts ¶ 5, ¶ 59. This statute makes it less likely that the communities will find the returnees much improved.

Intuitively, one has reason to doubt the utility of a state policy that turns away from providing education for a class of state residents, even--perhaps especially--if the class is composed of persons who appear relatively undeserving and in consequence are, for a period of time which may be lengthy, consigned by the state to custody. On the record made in this case, the testimony of plaintiffs' expert witnesses confirms intuition: the predictable social costs of not educating young persons in custody would appear to be very large. The testimony of defendants' experts tends to confirm, rather than rebut, that gloomy inference. So it appears that the Pennsylvania legislature

has given its blessing to an experiment that is likely to work to the state's detriment.

It is not, however, the province of a federal court to guard states from unwisdom unless that unwisdom transcends constitutional limitations. A state law that "may be unwise, improvident, or out of harmony with a particular school of thought" is not thereby unconstitutional. Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 488, 75 S.Ct. 461, 99 L.Ed. 563 (1955). In the strong words of Justice Frankfurter, "[m]uch that should be rejected as illiberal, because repressive and envenoming, may well be not unconstitutional." Dennis v. United States, 341 U.S. 494, 517, 556, 71 S.Ct. 857, 95 L.Ed. 1137 (1951) (Frankfurter, J., concurring).

Accordingly, the motion for a preliminary injunction barring the enforcement of 24 P.S.A. § 13-1306.2(a) is denied in an order accompanying this opinion.